

2001: A CODE ODYSSEY (NEW DAWN FOR THE ARTICLE 9 SECURED CREDITOR)

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I. INTRODUCTION

Revised Article 9 was promulgated in 1998 with an effective date of July 1, 2001.¹ The delayed effective date was intended to give all states time to "get on board the Revised Article 9 train." As of this writing (July 1, 2001), 46 states and the District of Columbia have adopted Revised Article 9. It awaits the governor's signature in the 4 other states.² Although all states have adopted Revised Article 9, some have delayed its effective date beyond July 1, 2001 to allow their filing offices to gear up for the new regime.³

Many trees have died and many CLE credits have already been earned in the name of understanding Revised Article 9. It contains 80 definitions, 126 provisions and is 298 pages long. Its predecessor, puny by comparison, has 14 definitions, 57 provisions and spans a mere 129 pages.

The revisions significantly expand Article 9's scope to include security interests in a commercial debtor's deposits accounts, tort claims and health-care insurance receivables. *Sales* of promissory notes and

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1. All references to Revised Article 9 are to Article 9 of the Revised Uniform Commercial Code ("R.U.C.C.") as amended in 2000.

2. Connecticut, Massachusetts, Missouri, and New York.

3. See, e.g., Connecticut (effective October 1, 2001); Alabama, Florida, and Mississippi (effective January 1, 2002).

payment intangibles (a new Article 9 life form) come within the Article 9 umbrella as do consignments and agricultural statutory liens. The revisions permit filing to perfect a security interest in instruments. They enlarge the definition of "proceeds" to include pretty much anything and everything remotely connected to or derived from the original collateral. They authorize secured transactions involving non-assignable, non-transferable property, e.g., licenses.

The revisions resolve most existing ambiguities (although not all).⁴ For instance, they establish a rebuttable presumption rule for noncomplying *commercial* dispositions. They override the transformation rule in a commercial setting, invalidate trade name filings, validate "all assets" financing statements, distinguish software from goods, and give the secured creditor in possession priority over a non-consumer buyer of the collateral. They redefine the term "debtor." "Debtor" is no longer the party indebted. That's the *obligor*⁵ under new Article 9 if the two are different. The *debtor* is the person with the interest in the collateral, e.g., the owner of the collateral.⁶ For some old dogs anyway, the change is counterintuitive and initially maddening,⁷ but the new definitions do bring needed clarity to who must do or give what to whom postdefault.⁸

4. For instance, the Revisions provide no enlightenment on when a debtor has "rights in the collateral." See Margit Livingston, *Certainty, Efficiency, & Realism: Rights in Collateral under Article 9 of the Uniform Commercial Code*, 73 N.C. L. REV. 115 (1994) (arguing that the requirement that a debtor have "rights in the collateral" should be deleted from Article 9 because of the confusion and uncertainty it has generated in the case law). Professor Livingston identifies two primary areas of confusion: (1) when a debtor has possession of collateral, but does not own it; and (2) when a debtor does not have possession of the collateral, but still has some rights in it. She proposes that, at least as far as tangible goods are concerned, having rights in collateral be eliminated as a required element of attachment under § 9-203. Failing that, she urges the adoption of specific priority and filing rules to deal with the trouble spots she identifies in her article. *Id.* at 184.

Similarly, the revisions do not define "public sale" and "private sale" for purposes of the kind of notice the foreclosing creditor must send to the debtor. See R.U.C.C. § 9-613.

5. R.U.C.C. § 9-102(a)(59).

6. R.U.C.C. § 9-102(a)(28). We share this information with you so you do not embarrass yourself in front of colleagues and friends by calling the person who owes the obligation a "debtor."

7. This change in terminology produced severe agitation for one of the authors, but with the love and support of friends and family, she was able to pick up the pieces and move on.

8. So, for instance, R.U.C.C. § 9-611(b) requires the secured party to send a "reasonable authenticated notification of disposition" to the persons identified in subsection (c). According to R.U.C.C. § 9-611(c)(1), the secured party must send the required notification to "the debtor." The new definition of "debtor" establishes that the secured creditor, postdefault, must notify all parties with "an interest, other than a security interest or other lien in the collateral." R.U.C.C. § 9-102(a)(28). This includes consignees and transferees of the collateral. The secured creditor need not notify the principal obligor.

The revisions dredge many safe harbors for the secured creditor including suggested form notices for public and private sales and a rule that 10-days notice of a disposition is reasonable. They also provide some (very modest) assistance to consumer debtors. Creditors must give consumer debtors a special foreclosure notice⁹ and a special notice of deficiency which explains the deficiency.¹⁰

Revised Article 9 also states rules to govern situations old Article 9 never addressed. For example, it posits priority rules for competing purchase-money security interests and for creditors of different debtors regarding transferred collateral. It describes when perfection lapses if collateral is transferred to an out-of-state transferee, when a filing officer can refuse to accept a financing statement, and how a debtor can counteract a bogus financing statement. The revisions facilitate electronic filing of financing statements by eliminating the requirement of the debtor's signature.¹¹ Finally, the revisions reword old Article 9's occasionally obscure language.¹²

Along with the changes in and clarifications of substantive law, the revisions alter Article 9's character. It is no longer a code but an elaborate, sometimes but not always interlocking, except-as-otherwise-provided-for MASS of specific rules seemingly designed to address every conceivable issue an asset-based financier might confront.¹³ (We know it is not possible to state a rule to govern every situation. What we *don't* know is why the revisors thought it was or what underlying *policy* will help to resolve the inevitable unforeseen situation.)

9. R.U.C.C. § 9-614.

10. R.U.C.C. § 9-616.

11. R.U.C.C. § 9-502.

12. Many provisions are restated in much clearer language, e.g., superpriority for the inventory pmsi lender, when a buyer cuts off a security interest, etc.

13. For a discussion of this trend in the recent revisions of other U.C.C. Articles as well, see Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000).

The effects of Revised Article 9 are not limited to state law.¹⁴ Secured creditors take security interests, in large part, to "bankruptcy-proof" their right to receive payment. Revised Article 9 will have a significant impact in the federal arena of bankruptcy. Indeed, at least one author argues that the main engine driving Revised Article 9 was enhanced bankruptcy protection for secured creditors.¹⁵

14. Attempting to describe the relationship between state law and the federal law of bankruptcy sparks the legal imagination. Judge Carol Kenner, United States Bankruptcy Judge for the District of Massachusetts, refers to state law as "matter" and bankruptcy as "anti-matter." We call bankruptcy "the magical kingdom." We warn students that everything they learned in Article 9, bankruptcy will turn upside down. So, for instance, at state law, the Article 9 creditor, indeed *any* creditor, has a right to be paid. Bankruptcy inverts that state law right. In bankruptcy, debtors have a legal right NOT to pay their creditors. 11 U.S.C. § 727(b) (1998). So, too, at state law, if a debtor defaults, the secured creditor has a right to repossess its collateral if it does not breach the peace. U.C.C. § 9-503. Bankruptcy "stays" that right. Instead of the right to repossess, bankruptcy gives secured creditors a right to "adequate protection." 11 U.S.C. §§ 363(e), 361 (1998); *United States v. Whiting Pools*, 462 U.S. 198, 211-212 (1983) ("When property seized prior to the filing of a petition is drawn into the Chapter 11 reorganization estate, the Service's tax lien is not dissolved; nor is its status as a secured creditor destroyed. The IRS, under § 363(e), remains entitled to adequate protection for its interests, to other rights enjoyed by secured creditors, and to the specific privileges accorded tax collectors. Section 542(a) simply requires the Service to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize."). Sometimes, the creditor's "right" to adequate protection means the debtor gets to use the creditor's collateral for nothing. But the privilege of allowing the debtor to use its collateral should be enough to make any secured party proud to be an American.

15. G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 & Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3 (2001). After an exhaustive discussion, Professor Warner concludes:

The bankruptcy-related revisions to Article 9 have both the purpose and effect of changing bankruptcy outcomes. They will neutralize important bankruptcy avoiding powers and will convert other estate-enhancing powers into tools to increase the recovery of secured creditors. The revision reallocates reorganization value from unsecured creditors to secured creditors and gives secured creditors greater control over the reorganization process. It does all this without a firm basis of theoretical or empirical support.

The Article 9 revisions are bankruptcy amendments disguised as state law reforms. They exceed the proper scope of a state uniform revision and violate bankruptcy policy. Revised Article 9 is an anti-bankruptcy act.

Id. at 84.

According to the Reporters for the Drafting Committee to Revised Uniform Commercial Code Article 9,

Revised Article 9 and other nonbankruptcy laws allocating property rights (such as priorities) cannot conflict with bankruptcy policies.

... We base our argument on property-related policies inherent in the Bankruptcy Code. Central to the analysis is the Bankruptcy Code's overarching respect for nonbankruptcy law's allocation of rights with respect to particular assets in which the bankruptcy debtor has an interest. Bankruptcy law gives effect to a debtor's prebankruptcy transfers of property (including security interests) and, correspondingly, to the rights of the holders of property interests that do not belong to the debtor. Security interests, like other property interests, benefit from these policies.

Steven L. Harris & Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy & Impact*, 9 AM. BANKR. INST. L. REV. 85, 87 (2001) (footnotes omitted).

(continued...)

This Article attempts to describe what bankruptcy lawyers and judges *most* need to know about Revised Article 9. (Of course, if bankruptcy judges and lawyers need to know it, a fortiori, secured creditors' attorneys need to know it.)

At the top of the most-need-to-know list are Revised Article 9's choice-of-law and filing rules. Section 544(a) of the Bankruptcy Code,¹⁶ the "trustee's strong-arm" clause, permits the trustee (and debtor-in-possession¹⁷) to avoid unperfected security interests. For many transactions, Revised Article 9's choice-of-law provisions will change where the creditor must file to perfect its interest. Those who do not know about Revised Article 9 or more likely, those who do not understand its new choice-of-law rules, will be sitting ducks for the bankruptcy trustee. Avoidance of their interests won't even be sporting (but it will be lucrative).

A working knowledge of Revised Article 9's transition rules is equally important. Many a pre-effective date ("PED") perfected security interest will shipwreck on the shoals of Revised Article 9's transition rules.¹⁸ These rules are hard to fathom. The PED creditor who does not understand them, at a minimum, risks preference exposure, and at a maximum, risks annihilation under Section 544(a) of the Bankruptcy Code. Loosely translated, if Revised Article 9 would require the creditor to file in a different state from that required by old section 9-103, the PED creditor *cannot* continue its filed financing statement by filing a continuation statement in the "old, PED state." To *continue* its PED financing statement and maintain its PED priority date, the creditor must file a special statement, referred to as "an initial financing statement in lieu of a continuation statement."¹⁹ Moreover, the creditor must file that special statement according to Revised Article 9's choice-of-law and filing rules.

15. (...continued)

Both arguments have merit. Revised Article 9 does not violate any bankruptcy *policy* per se, but ultimately it is going to have a dramatic impact on bankruptcy (assuming meaningful bankruptcy relief is still available). Revised Article 9 erects few, if any, hazards on the road to perfection. Indeed, it has constructed a high speed superhighway. After an initial period of chaos as the players learn the new rules, taking and perfecting a security interest will be a "cake walk." That will translate, in bankruptcy, to fewer unencumbered assets available for distribution to unsecured creditors or to help fund a debtor's reorganization effort.

16. 11 U.S.C. § 544 (1998).

17. *Id.* § 1107(a).

18. Part 7, §§ 9-701 through 9-709.

19. Described in R.U.C.C. § 9-507 and referred to as an "in lieu" statement.

Many creditors will mistakenly assume that perfecting or re-perfecting according to the new regime's rules will be enough. It won't be. It won't preserve the creditor's PED perfection date. If the PED creditor does not *continue* its PED financing statement (by filing an "in lieu" initial financing statement according to the new rules), it will lose the priority date established by its PED financing statement. Re-perfection under Revised Article 9 will create a new date of transfer for preference analysis purposes.²⁰ If the debtor files bankruptcy within 90 days of the date of the creditor's re-perfection, the interest may constitute an avoidable preference.²¹

We predict that chaos will rule the land for the next 10 years or so as everyone—courts as well as attorneys—tries to figure out this behemoth of a statute. During this period, Bankruptcy trustees will harvest bumper crops of unperfected security interests. At some point down the road, though, secured creditors and their attorneys will finally "get it." And when Cousin Vinny masters Revised Article 9, the world is going to be the secured creditor's oyster - inside and outside bankruptcy. It is going to be as easy as pie to take and perfect an Article 9 security interest in pretty much everything that can't be planted or plowed. That means few to no assets unencumbered by a perfected Article 9 security interest and few to no security interests for the bankruptcy trustee to avoid.

Revised Article 9 represents a new dawn for secured creditors, a deep abyss for unsecured creditors and a Code odyssey for the rest of us.

II. CHANGES IN SCOPE & DEFINITION

Revised Article 9 significantly expands the universe of Article 9 transactions, and in doing so, changes Article 9's core concept. It is no longer a body of law regulating consensual interests in personal property to secure payment or performance of an obligation. Revised Article 9 is not limited to *consensual* liens. It applies to agricultural *statutory*

20. For purposes of § 547(b), the "transfer" occurs at the time of perfection, not the time of attachment of the security interest, if perfection occurs more than 10 days after attachment. 11 U.S.C. § 547(e)(2)(B) (1998).

The transition rules are going to trip up many a secured creditor even without the Bankruptcy wrinkle. The transition rules phase in the new regime over time (June 30, 2006) which means those searching for outstanding claims must search under both Revised Article 9's choice-of-law and filing rules and old Article 9's choice-of-law and filing rules.

21. If the transfer occurred within 90 days of bankruptcy, was made while the debtor was insolvent and constituted an improvement in the creditor's position, the trustee can avoid it unless the creditor can prove a § 547(c) exception applies.

liens.²² Moreover, Revised Article 9 is not limited to *financing* transactions. It governs true-blue consignments.²³ Revised Article 9 also expands its coverage of sales transactions to include sales of payment intangibles and promissory notes.²⁴ It brings in new forms of collateral, in particular, commercial deposit accounts,²⁵ and commercial tort claims.²⁶ Finally, it redefines "account" to include a far broader class of rights to payment, e.g., health-care-insurance receivables, credit card receivables, licenses and sales of real estate.²⁷

A. AGRICULTURAL LIENS

Revised Article 9 applies to agricultural liens. Revised section 9-102(a)(5) defines "agricultural lien" as

an interest, other than a security interest, in farm products:

- (A) which secures payment or performance of an obligation for
 - (i) goods or services furnished in connection with a debtor's farming operation; or
 - (ii) rent on real property leased by a debtor in connection with its farming operation;
- (B) which is created by statute in favor of a person that:
 - (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or
 - (ii) leased real property to a debtor in connection with the debtor's farming operation; and
- (C) whose effectiveness does not depend on the person's possession of the personal property.

Freely translated, Revised Article 9 governs (1) nonpossessory, (2) statutory liens, (3) that arise in favor of those who, in their ordinary course of business, provide goods or services, or lease real property, to debtor-farmers to use in their farming operations.²⁸

22. R.U.C.C. § 9-108(a)(2).

23. *Id.* § 9-108(a)(4).

24. *Id.* § 9-109(a)(3).

25. *Id.* § 9-108(d)(13).

26. *Id.* § 9-108(d)(12).

27. *Id.* § 9-102(a)(2).

28. The definition of "farm products" includes aquatic goods produced in aquacultural operations. R.U.C.C. § 9-102(a)(34).

Revised Article 9 does not govern the creation of such liens.²⁹ It *does* impose a duty on the lien holder to "perfect it" (give public notice) according to the Article 9 filing rules.³⁰ As a general rule, Revised Article 9 regulates the priority of agricultural liens. Because superpriority is limited to purchase-money *security interests*,³¹ and an agricultural lien is not a security interest, agricultural lienors are subject to Article 9's general first-to-file-or-perfect rule.³²

Does this mean the prior filed Article 9 lender will always have priority over any and all subsequent agricultural liens even if they are perfected? Maybe often, but not always. If the statute creating the agricultural lien gives the lien priority, the lien will have priority *if* it is perfected.³³ If the statute giving rise to the lien does *not* give the agricultural lien priority, even the perfected agricultural lien will be subordinate to the prior filed secured lender!³⁴

Can the bankruptcy trustee avoid an agricultural lien if the lienholder, as of the commencement of a bankruptcy case, has failed to file a financing statement according to Revised Article 9's rules? Yes.³⁵ An agricultural lien is subordinate to the rights of a person who becomes

29. Revised Article 9 carefully distinguishes between agricultural liens and security interests. The rules regarding attachment are limited to *security interests*. R.U.C.C. § 9-203 (captioned "Attachment and Enforceability of Security Interest . . ."). Therefore, Article 9 does not govern creation of an agricultural lien.

30. R.U.C.C. § 9-310(a) ("Except as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests *and agricultural liens*."). *Id.* § 9-501(a) ("if the local law of this State governs perfection of a security interest *or agricultural lien*, the office in which to file a financing statement to perfect the security interest *or agricultural lien* is . . .").

31. R.U.C.C. §§ 9-103, 9-324.

32. *Id.* § 9-322(a).

33. R.U.C.C. § 9-322(g) ("A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides); *see also id.* cmt. 12.

34. Of course, if the prior secured creditor or indeed, a prior agricultural lienor, is not perfected, the subsequent *perfected* agricultural lien will have priority as the first to file.

35. This assertion applies only to agricultural liens that come into existence *after* Revised Article 9's effective date. Transactions that occurred pre-effective date (PED) that were not subject to old Article 9, e.g., agricultural liens that arose before July 1, 2001, can be enforced according to the law under which they arose. R.U.C.C. § 9-702(b)(1)-(2) ("(1) . . . liens that were not governed by [former Article 9], were validly entered into or created before this [Act] takes effect, and would be subject to this [Act] if they had been entered into or created after this [Act] takes effect, and the rights, duties, and interests flowing from those . . . liens remain valid after this [Act] takes effect; and (2) the . . . liens may be terminated, completed, consummated, and enforced as required or permitted by this [Act] or by the law that otherwise would apply if this [Act] had not taken effect."). Assume an agricultural supplier, before July 1, 2001, obtained a valid and enforceable lien pursuant to non-Article 9 law. The supplier's lien would be valid, enforceable and unavoidable in the debtor's subsequent bankruptcy even though the lienor did not perfect according to Revised Article 9's rules and the debtor filed bankruptcy after July 1, 2001.

a lien creditor before the lien is perfected according to Revised Article 9.³⁶ At least the revisors were considerate enough to allow agricultural lienors to file their financing statements in the state where the farm products are located.³⁷ That state's law also governs the effect of perfection or nonperfection, and priority.³⁸

B. CONSIGNMENTS

Revised Article 9 also applies to consignments as defined. A "consignment" is

a transaction . . . in which a person delivers goods to a merchant for the purpose of sale and;

(A) the merchant

(i) deals in goods of that kind under a name other than the name of the person making delivery;

(ii) is not an auctioneer; and

(iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;

(C) the goods are not consumer goods immediately before delivery; and

(D) the transaction does not create a security interest that secures an obligation.

This definition excludes consumer consignments and small commercial consignments, i.e., deliveries of goods valued at less than \$1,000.

Assuming the transaction meets the definition, Revised Article 9 characterizes the consignment as a purchase-money security interest (pmsi) in a debtor's inventory. The term "security interest" includes the interest of a consignor.³⁹ The definition of "pmsi" defines a consignor's security interest in consigned goods as a pmsi in inventory.⁴⁰ The

36. R.U.C.C. § 9-317(a)(2)(A).

37. *Id.* § 9-302 ("Law Governing Perfection & Priority of Agricultural Liens"). The law of the state where the debtor is located governs perfection of nonpossessory *consensual* security interests in farm products. *Id.* § 9-301(1). This means searchers looking for outstanding claims against a farmer's farm products will need to search in the state where *the goods are located* for agricultural liens and in the state where the debtor is located for consensual liens.

38. *Id.* § 9-301(3)(C).

39. Proposed Amendment to U.C.C. § 1-201(37).

40. R.U.C.C. § 9-103(d).

consignor who "perfects" (files a financing statement) protects its ownership interest from eradication in the consignee-debtor's bankruptcy. The consignor, like any other inventory pmsi creditor, can obtain superpriority if it files a financing statement before the debtor takes possession, notifies prior filed inventory claimants, etc., etc.⁴¹

Revised Article 9's treatment of consignments as pmsi transactions is limited to the consignor's rights vis-a-vis certain third parties, namely, creditors of and buyers from the consignee. Revised Article 9 does not regulate the relationship between the consignor and consignee or their respective rights and liabilities.⁴²

In terms of third parties, the consignee is deemed to have whatever rights and title the consignor had or had the power to convey.⁴³ This legal fiction permits consignees to grant security interests in consigned goods. By operation of law, the consignee has the rights of the consignor. The consignor qua owner of the goods has sufficient rights in the collateral to create a security interest in favor of someone else.⁴⁴ As between the consignor and a creditor of the consignee, other law, not Article 9, determines the parties' respective rights *if and only if* the consignor is perfected and would have priority over the creditor.⁴⁵

Is this change in the treatment of consignments significant? In the grand scheme of things, we think not. Revised Article 9 does create a much needed consumer-consignor exception and it does shelter small-potato commercial consignors, but other than that, the change seems more formal than substantive. Commercial consignors continue to remain outside the clutches of Article 9 if their consignee is generally known by its creditors to be substantially engaged in selling the goods of others.⁴⁶ Although commercial consignors lose the right to prove compliance with a local sign law under Revised Article 9, the loss is de minimis because today few, if any, sign laws exist.⁴⁷ Consignors were

41. *Id.* § 9-324(b).

42. "[T]he rules pertaining to lien creditors, buyers, and attachment, perfection, and priority of competing security interests apply to consigned goods. The relationship between the consignor and consignee is left to other law. Consignors also have no duties under Part 6." *Id.* § 9-109, cmt. 6.

43. *Id.* § 9-319(a).

44. R.U.C.C. § 9-203(b)(2).

45. *Id.* § 9-319(b).

46. *Id.* § 9-102(a)(20)(A)(iii). Compare with U.C.C. § 2-326(3)(b).

47. See U.C.C. § 2-326(a).

a pretty easy target for bankruptcy trustees under old Article 9.⁴⁸ They will remain so under Revised Article 9.

As noted, Revised Article 9 characterizes a consignor as holding a pmsi in inventory. This means consignors risk subordination to a prior filed inventory lender unless they comply with the Article 9 rules for superpriority for pmsis in inventory.⁴⁹ Complying with these rules may prove difficult. Filing on ordinary goods is no longer governed by the law of the state where the goods are located. Revised Article 9 requires creditors to file centrally in the state of the debtor's location,⁵⁰ which is the state of incorporation for corporate debtors.⁵¹ For corporate debtors who operate in many states, "there will be mountains of filings"⁵² in the debtor's "home" state. Many of those filings will claim "all assets."⁵³ Consequently, "the hassle and expense of sending notices to prior filers will be much greater and may not be worth it."⁵⁴

C. DEPOSIT ACCOUNTS

Former Article 9 recognized an Article 9 creditor's security interest in a deposit account if the deposit account represented or contained proceeds of its collateral.⁵⁵ Revised Article 9 continues that rule.⁵⁶ Revised Article 9 also permits creditors to take an Article 9 security interest in deposit accounts as *original* collateral if the account is not a consumer account.⁵⁷ According to the Official Comments, leaving deposit accounts to the vagaries of the common law precluded some debtors from using their deposit accounts as collateral because "the

48. See, e.g., *In re TriStar Automotive Group, Inc.*, 141 B.R. 41 (Bankr. S.D.N.Y. 1992) (holding consignor's interest avoidable because it failed to prove consignor was substantially engaged in selling goods of others and it did not file).

49. R.U.C.C. § 9-324(b). In this, Revised Article 9 simply carries forward the tradition established by § 9-114.

50. *Id.* § 9-301(1).

51. *Id.* §§ 9-307(e), 9-501.

52. James L. Dam, *Lawyers Scramble to Learn New Rules on Secured Transactions*, LAWYERS WEEKLY USA, January 21, 2001, 1, at 20 (quoting Mark Bossi, chair of the American Bankruptcy Institute's U.C.C. Committee).

53. R.U.C.C. § 9-504(2) validates supergeneric descriptions for financing statements.

54. Dam, *supra* note 52, at 21, summarizing comments of both Mark Bossi and Professor Ray Warner.

55. U.C.C. § 9-104(f).

56. *Id.* § 9-109(d)(43).

57. *Id.* § 9-109(d)(43).

common law is nonuniform, often difficult to discover and comprehend, and frequently costly to implement."⁵⁸

Taking and perfecting a security interest in a commercial deposit account cannot happen serendipitously. The description "general intangibles" will not capture a debtor's deposit account(s) because "deposit account" is a separate, discrete type of collateral.⁵⁹ The security agreement must grant an interest in the debtor's deposit accounts or a specific deposit account. Moreover, perfection of a security interest in a deposit account can only occur if the creditor has "control" over it.⁶⁰ Control only exists if (1) the secured creditor is the depositary bank; or (2) the debtor, secured creditor and depositary bank agree that the bank will follow the creditor's instructions without the debtor's further consent; or (3) the creditor becomes the depositary bank's customer regarding the account.⁶¹

Can a depositary bank under Revised Article 9 have both a security interest in the debtor's account and a right of set off against the account? In other words, is there a distinction between a security interest and a right of set off when the depositary bank has loaned the debtor money? Yes, there is. According to Revised Article 9's enforceability rules, a security interest in a bank account only attaches if the creditor has control "*pursuant to the debtor's security agreement*."⁶² A bank's set off right arises by operation of law without the debtor's agreement or consent. So, it is possible for one creditor, a bank, to have a security interest in and a right of set off against a debtor's bank account. One does not affect or impair the other.⁶³

Revised § 9-327 states priority rules for *security interests* in deposit accounts. The Article 9 creditor with control has priority over the Article 9 creditor without it,⁶⁴ e.g., the creditor with control over the account has priority over the creditor claiming the account as proceeds of its collateral. As a general rule, security interests perfected by control are ranked according to the time when control was obtained.⁶⁵ Thus, the first to obtain control has first priority. But, the security interest of a

58. *Id.* § 9-109 cmt. 16.

59. *Id.* § 9-109 cmt. 16.

60. *Id.* §§ 9-312(b)(1), 9-314(a), 9-104.

61. *Id.* § 9-104.

62. *Id.* § 9-203(b)(3)(D).

63. *Id.* § 9-340 cmt. 3 ("[b]y holding a security interest in a deposit account, a bank does not impair any right of set-off it would otherwise enjoy.").

64. *Id.* § 9-327(1).

65. *Id.* § 9-327(b).

depository bank as Article 9 creditor has priority over a conflicting security interest⁶⁶ unless the competing secured creditor is the bank's customer of the account.⁶⁷

What about the conflict between a depository bank's set off right and the Article 9 creditor's security interest in the deposit account? The depository bank's set off right prevails unless the secured creditor is the depository bank's customer vis-a-vis the account.⁶⁸

Revised Article 9's treatment of security interests in deposit accounts does not appear to affect banks and their common law rights of set off and recoupment. The effect, if any there is, lies in permitting the secured creditor to encumber collateral that might otherwise be available to the debtor and/or the debtor's unsecured creditors.⁶⁹

D. COMMERCIAL TORT CLAIMS

Revised Article 9 makes commercial tort claims available as Article 9 collateral.⁷⁰ The definition of "tort claim" includes all tort claims arising with respect to organizations.⁷¹ For individuals, it is limited to tort claims that arise in the claimant's business or profession and does not include damages for personal injury or death.⁷²

Commercial tort claims, like deposit accounts, are a separate, discrete collateral form. Taking a security interest in a debtor's general intangibles will not capture the debtor's tort claim(s). In fact, even a generic description, a description by type, e.g., "commercial tort claims," is insufficient. "[G]reater specificity of description [is required] . . . to prevent debtors from inadvertently encumbering certain property."⁷³ Language that permits the reader to reasonably identify what is described is sufficient. "Debtor's patent infringement claim against XYZ Co." is presumably an adequate description.

66. *Id.* § 9-327(c).

67. *Id.* § 9-327(4).

68. *Id.* § 9-340. Unless we are missing something, the depository bank does not have a right of set off in the situation posed and therefore, this priority rule is not necessary. According to the common law, a right of set-off only exists if the parties owe mutual debts, i.e., A owes B and B owes A. If the Article 9 creditor (SP) is the depository bank's customer, the bank (B) owes its debt to SP, not the debtor (D). The debts are *not* mutual. B owes SP. D owes B. Therefore, B has no right of set off against the bank account and SP has "priority" as the only one with a claim to the account.

69. Warner, *Anti-Bankruptcy Act*, *supra* note 15, at 45-48.

70. R.U.C.C. § 9-108(d)(12).

71. *Id.* § 9-102(a)(13).

72. *Id.* § 9-102(a)(13)(B).

73. *Id.* § 9-108, cmt. 5.

Commercial tort claims are personal property. Revised Article 9, like former Article 9, governs all consensual security interests in personal property unless the transaction is excluded. Revised Article 9 simply narrows the exclusion. Revised Article 9 excludes from its coverage security interests in *consumer* tort claims and individual business claims involving damages for death or personal injury.⁷⁴

What if a tort claim is settled and the debtor offers its rights under the settlement as collateral? What is it? It is no longer a claim arising in tort. It is a "payment intangible,"⁷⁵ a subset of general intangibles, more fully described below. The limitations concerning tort claims as collateral do not appear to carry over to settlement rights.⁷⁶ Thus, one supposes a creditor can engage in an Article 9 secured transaction using a consumer's rights under his/her settlement agreement as collateral.

E. ACCOUNTS

Former Article 9 limited "accounts" to rights to payment for *goods sold or leased* or services rendered.⁷⁷ It classified payment rights stemming from transactions involving *intangibles* or real estate as general intangibles, Article 9's catch-all or residual category of personal property. Revised Article 9 substantially redefines "account." "Account" includes rights to payment for *any* "property sold, leased, licensed, assigned or otherwise disposed of."⁷⁸ So, a seller's right to receive payment under a contract to sell real estate is an account under Revised Article 9. A company's right to receive payments under a software license is an account. "Account" also includes health-care-insurance⁷⁹ and credit card receivables⁸⁰ as well as rights to receive

74. *Id.* § 9-109(d)(12).

75. *Id.* § 9-102(a)(61).

76. *Id.* § 9-109 cmt. 15 provides:

Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay (as in, but not limited to a structured settlement) the right to payment becomes a payment intangible and ceases to be a claim in tort.

77. U.C.C. § 9-106.

78. R.U.C.C. § 9-102(a)(2).

79. R.U.C.C. § 9-101, comment 4.a., states: "This Article enables a security interest to attach to . . . health-care insurance receivables . . . notwithstanding a contractual or statutory prohibition against or limitation on assignment." This might strike the reader as odd. Exactly how did the revisors plan to override or get around federal law with Article 9? The answer lies in R.U.C.C. § 9-408, captioned "Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective." Revised Article 9 separates attachment and perfection of a security interest in governmental health-care receivables from the

(continued...)

payment for energy provided (or to be provided),⁸¹ insurance policies issued (or to be issued)⁸² and lottery winnings.⁸³ The enormous expansion in the world of accounts under Revised Article 9 causes a concomitant contraction in its universe of general intangibles.

Despite its expansiveness, the newly reconstituted category of accounts does not include all rights to payment. Payment rights deriving from chattel paper, instruments, commercial tort claims, deposit accounts, investment property and letter-of-credit rights are not accounts.⁸⁴ In addition, "rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card," are not accounts.⁸⁵ So, a bank's right to re-payment of a loan remains a general intangible under Revised Article 9 as does a tenant's interest in a security deposit and a borrower's interest in an escrow account.

Why did the revisors choose to define "accounts" so broadly? Presumably to make its potpourri of payment rights subject to the Article 9 rules regarding accounts. Whether a transaction in accounts is a sale or a secured transaction, Article 9 governs.⁸⁶ The Article 9 formalities for attachment and perfection apply. The accounts *buyer* as well as the accounts *lender* must give public notice of its claim. It must file an Article 9 financing statement. If the accounts buyer fails to file, its ownership claim is not effective against third parties including the bankruptcy trustee. So, *buyers* of lottery winnings, credit card receiv-

79. (...continued)

government/account-debtor's obligation to pay and other issues. According to Revised Article 9, restrictions on or prohibitions against assignments or security interests are ineffective to: (1) impair the creation and/or perfection of a security interest in a health-care receivable; (2) establish a debtor default; or (3) give the account debtor a right to terminate its contract with the debtor. R.U.C.C. § 9-408(a)-(b). R.U.C.C. § 9-408(d) spells out R.U.C.C. § 408(a)'s limited effect. For instance, it does not entitle the secured creditor to enforce the security interest. R.U.C.C. § 9-408(d)(6). The creditor's security interest is "not enforceable *against . . . the account debtor*," R.U.C.C. § 9-408(d)(1) [emphasis added], and does not impose a duty or obligation on the account debtor. R.U.C.C. § 9-408(d)(2). These provisions are intended to "enhance[] the ability of certain debtors to obtain credit [S]ubsection (d) protects the other party . . . from adverse effects arising from the security interest." R.U.C.C. § 9-408 cmt. 2.

Revised Article 9 provides similar treatment for licenses. It separates a creditor's right to take and perfect an security interest in a license from the State's public-protection/fee collection function. See R.U.C.C. § 9-408.

80. R.U.C.C. § 9-102(a)(2)(vii).

81. *Id.* § 9-102(a)(2)(v).

82. *Id.* § 9-102(a)(2)(iii).

83. *Id.* § 9-102(a)(2)(viii).

84. *Id.* § 9-102(a)(2)(i)-(v).

85. *Id.* § 9-102(a)(2)(vi).

86. U.C.C. § 9-102(a)(2); R.U.C.C. § 9-109(a)(3).

ables, most health-care receivables,⁸⁷ etc., etc., must give public notice of their ownership claims by filing an Article 9 financing statement. If they do not, they risk losing their ownership interest in the seller's subsequent bankruptcy.

Revised Article 9 also resolves the logical tangle created by treating sales of accounts (and chattel paper) as secured transactions and defining "security interest" to include "any interest of a buyer of accounts or chattel paper which is subject to Article 9."⁸⁸ Revised Article 9 expressly establishes that a person who sells accounts (or chattel paper, promissory notes and payment intangibles) does *not* retain a legal or equitable interest in the property sold. If the seller subsequently files bankruptcy, the accounts (chattel paper, etc.) do not become property of the seller's bankruptcy estate.⁸⁹

What if the buyer does not give the requisite notice of its ownership interest by an Article 9 filing? The buyer's failure to "perfect" is limited to its rights vis-a-vis creditors of and purchasers for value from the debtor-seller:

For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.⁹⁰

87. Assignments to the health care provider, i.e., patient to doctor, patient to hospital, are automatically perfected. R.U.C.C. § 9-309(5) (automatic perfection for security interests created by assignment of health-care-insurance receivable to provider of health-care goods or services). The normal rules regarding accounts govern other assignments of health-care receivables, e.g., from provider to lender. R.U.C.C. § 9-309, comment 5, explains:

Paragraph 5 extends automatic perfection to assignments of health-care-insurance receivables if the assignment is made to the health-care provider that provided the health-care goods or services. The primary effect is that, when an individual assigns a right to payment under an insurance policy to the person who provided the health-care goods or services, the provider has no need to file a financing statement against the individual. The normal filing requirements apply to other assignments of health-care-insurance receivables covered by this Article, e.g., assignments from the health-care provider to a financier.

88. U.C.C. § 1-201(37).

89. R.U.C.C. § 9-318(a) ("A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold."). One supposes that R.U.C.C. § 9-318(a) is an attempt to override cases like *Octagon Gas Sys., Inc. v. Rimmer*, 995 F.2d 948, 957 (10th Cir.), *cert. denied*, 510 U.S. 993 (1993) to make the world safe for securitization and bankruptcy-remote vehicles. Of course, if the buyer fails to give public notice of its ownership claim, the trustee can avoid the buyer's interest and the property will become property of the debtor-seller's estate. 11 U.S.C. §§ 544(a), 541(a)(3) (1998).

90. R.U.C.C. § 9-318(b).

So, Revised Article 9 attempts to insulate properly filed buyers of such property from their debtor-seller's bankruptcies.

Revised Article 9 applies to sales of promissory notes and payment intangibles as well as to sales of accounts and chattel paper. Revised Article 9 brings such sales within its scope only to provide for their automatic perfection.⁹¹ What's going on?

The apparent effect of bringing a sale of a promissory note within Revised Article 9 and then allowing for automatic perfection of the sale is that the interest of the buyer of a negotiable note is good as against the creditors of the seller even though the seller still has possession. There is neither public notice nor a change in possession to alert third parties that the seller is no longer the owner of the note it still possesses. The seller's trustee in bankruptcy cannot avoid the sale under Section 544(a) . . . because state law lien creditors do not have priority over the buyer under Revised Article 9. Secret interests are allowed to facilitate securitization of the notes.⁹²

Ultimately, the success of this "bankruptcy-proofing" strategy will turn on two things: 1) the bankruptcy court's conclusion that the transaction in question represents a true, real, honest-to-goodness sale; and 2) the Bankruptcy Court's willingness to defer to state law to determine the nature of a debtor's property interest.⁹³ Only time will tell.

F. GENERAL INTANGIBLES

Along with decreasing, by legislative fiat, the kinds of personal property inhabiting the world of general intangibles, Revised Article 9 carves out a subcategory of general intangible—the "payment intangible." "Payment intangible means a general intangible under which the account debtor's principal obligation is a monetary obligation."⁹⁴ So, the

91. *Id.* § 9-309(3), (4).

92. JULIAN B. McDONNELL, UNIFORM COMMERCIAL CODE ANALYSIS OF REVISED ARTICLE 9, § 9-309, at 175 (Lexis 1999). The same holds true for sales of payment intangibles.

93. Although bankruptcy courts often defer to state law to characterize a debtor's property interests or lack thereof, they should not do so if a federal interest requires a different result. *Butner v. United States*, 40 U.S. 48, 55 (1971). At an oral presentation, Judge William C. Hillman, off the cuff, described special purpose vehicles, bankruptcy remote entities, etc., as an attempt to "opt out of bankruptcy." Revised Article 9 creates the formalities for exercising such an opt out right. Whether it is recognized in bankruptcy is another matter.

94. R.U.C.C. § 9-102(a)(61).

bank's or credit union's right to receive repayment from a borrower qualifies as a payment intangible. Settlement of a tort claim that gives rise to a right to payment is a payment intangible.⁹⁵ Revised Article 9 segregates payment intangibles from other general intangibles so it can provide special treatment for this category of payment rights and promissory notes.

G. EXPANSION OF SALES COVERAGE

As noted, Revised Article 9 governs *sales* of promissory notes and payment intangibles in addition to sales of accounts and chattel paper. Unlike sales of accounts and chattel paper, however, sales of payment intangibles and sales of promissory notes are *not* subject to the Article 9 formality of public notice, the filing of a financing statement. The buyer's interest perfects automatically.⁹⁶ Revised U.C.C. section 9-309, Official Comment 4, "explains" that automatic perfection of sales of notes and payment intangibles reflects the practice under former Article 9: "filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes, inasmuch as the former Article did not cover those sales." (?) Why bring transactions into Article 9 only to exempt them from Article 9's public notice rules? That's easy. "The revisers were not interested in giving public notice of [such] sales, but in assuring that a sale could not be undone by a trustee in bankruptcy."⁹⁷ And, of course, protecting such sales from avoidance in bankruptcy assists in the attempt to create "bankruptcy remote" entities.

95. *Id.* § 9-109 cmt. 15.

96. *Id.* § 9-309(4). Although not expressly stated, one supposes the buyer must nevertheless comply with R.U.C.C. § 9-203's attachment formalities. Proposed Amendment to § 1-201(37) defines "security interest" to include "any interest of a . . . buyer of . . . a payment intangible, or a promissory note in a transaction that is subject to Article 9." A security interest does not exist unless it attaches. Attachment only occurs if the requirements of R.U.C.C. § 9-203 are satisfied. Therefore, it would appear that the buyer of promissory notes or payment intangibles needs to comply with R.U.C.C. § 9-203 to have a legally recognized ownership interest in the notes or payment intangibles. The absence of a record of an agreement or more likely, a faulty description might permit the bankruptcy trustee to invalidate the buyer's ownership claim.

97. McDONNELL, *supra* note 92, § 9-109, at 100 (Lexis 1999).

H. GOVERNMENT AS DEBTOR

Revised Article 9 significantly narrows the exclusion for governments-as-borrowers.⁹⁸ It subjects transfers by governmental debtors to the Article 9 rules unless another statute regulates the specific issue raised.⁹⁹

III. CHOICE-OF-LAW RULES

A. CHOICE-OF-LAW RULES GENERALLY

Revised Article 9's most striking change is probably its reformulation of the Article 9 choice-of-law rules. These rules, described in sections 9-301 through 9-307, state which jurisdiction's law governs three issues: 1) perfection, 2) the effect of perfection or nonperfection, and 3) the priority of security interests.¹⁰⁰ Both the statutory text and its comments are very clear about the precise scope of Revised Article 9's choice-of-law rules. They govern priority issues as well as questions of perfection. Moreover, the term "priority" includes the "cut off" and "take free" rules.¹⁰¹ These choice-of-law provisions do *not* govern other issues, e.g., whose law governs the validity of a repossession, whether a transaction is a lease or security interest, whether the debtor intended to create a security interest, whether the debtor has rights in the collateral, whether the security agreement properly described the collateral, etc., etc.¹⁰² Revised Article 9's choice-of-law rules apply to and are limited to "perfection, the effect of perfection or nonperfection,

98. R.U.C.C. § 9-109(c)(2)-(3).

99. *Id.* at cmt. 9.

100. *Id.* § 9-301 cmt. 2.

101. R.U.C.C. § 9-301 cmt. 2 ("This Article follows . . . [a] broader and more precise formulation . . . : perfection, the effect of perfection or non-perfection, and the priority of security interest. Priority, in this context, subsumes all of the rules in Part 3, including 'cut off' or 'take free' rules . . .").

102. They do *not* govern other choice-of-law issues, for example, "attachment, validity, characterization (e.g., true lease or security interest), and enforcement . . ." R.U.C.C. § 9-301, cmt. 2. Current § 1-105 recognizes party autonomy regarding those choice-of-law issues so long as the chosen state bears some reasonable relationship to the transaction.

R.U.C.C. § 9-401 and its comments identify yet a third cluster of issues involving choice-of-law questions, viz., "the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction." *Id.* § 9-342 cmt. 2. For instance, whose law governs whether a restriction on assignment is enforceable? "This Article does not provide a specific answer to the question . . ." *Id.* at cmt. 3.

and the priority of security interests¹⁰³ Beware: Sometimes, one state's law will govern *perfection* while another state's law will govern *the effect of perfection or nonperfection and priority*.

For many, many transactions, the change in choice-of-law rules will change the state in which the creditor must file to perfect its interest. As a result, Revised Article 9 will require many, many "pre-existing" (pre-effective date or "PED") secured creditors to do something to maintain their perfected status under the new regime. This change in the law will undoubtedly provide bankruptcy trustees with a steady supply of unperfected security interests for years to come.

By way of overview,¹⁰⁴ revised U.C.C. section 9-301 states Revised Article 9's basic choice-of-law rules. Revised U.C.C. sections 9-302 through 9-306 state exceptions—special rules for specific types of collateral ("specialty collateral"), e.g., goods covered by a certificate of title,¹⁰⁵ agricultural liens,¹⁰⁶ deposit accounts,¹⁰⁷ investment property,¹⁰⁸ and letter-of-credit rights.¹⁰⁹

Generally, Revised Article 9 holds that the law of the *state where the debtor is located* governs all three issues—perfection, the effect of perfection or nonperfection, and priority.¹¹⁰ Revised U.C.C. section 9-307 defines where a debtor is located. In terms of which state's law governs how the creditor *perfects* its interest, there is only one exception to this basic rule. The exception relates to *possessory* security interests. Because a possessory security interest can only exist in tangible collateral, i.e., collateral capable of being possessed, this choice-of-law exception only applies to goods, negotiable documents, instruments,

103. In most cases, the effect of non-perfection is a loss of priority, but one supposes the opposite is not true, necessitating Revised Article 9's more precise formulation.

104. Traveler's advisory: in some sense, the whole discussion here is an overview. It attempts to simplify the rules without being inaccurate. Figuring out the basic choice-of-law rules is complicated enough. We leave to the reader the task of sorting through the complexities of choice-of-law rules for investment property, letter-of-credit rights and other specialty collateral.

105. R.U.C.C. § 9-303. The local law of the jurisdiction under whose certificate of title the goods are covered controls. *Id.* § 9-303(c).

106. *Id.* § 9-302 (local law of jurisdiction where farm products are located governs perfection, the effect of perfection or nonperfection, and priority). As Professor McDonnell points out, searchers looking for outstanding claims to farm products will have to search the files of two states. They will have to look for agricultural liens in the state where the farm products are located. They will have to search for security interests in the state where the debtor is located. McDONNELL, *supra* note 92, § 9-301, at 147.

107. According to R.U.C.C. § 9-304, the law of the bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and priority.

108. *Id.* § 9-305.

109. *Id.* § 9-306.

110. *Id.* § 9-301(1).

money, and tangible chattel paper. If the creditor wants to perfect its interest by possessing the collateral, a situs of the collateral rule controls. The law of the state *where the collateral is* governs perfection.¹¹¹ That same state also governs the effect of perfection or non-perfection, and priority.¹¹²

What about *nonpossessory* security interests in tangible collateral? Here, Revised Article 9 distinguishes between the law governing how the creditor perfects and the law governing the effect of perfection or nonperfection, and priority. For *nonpossessory* security interests in tangible collateral, the law of the state where the *debtor is located* controls *perfection*. The law of the state where the *collateral is located* governs *the effect of perfection or nonperfection, and priority*.¹¹³

The above rules are tricky. Be careful. Said another way,

- For *intangible collateral*, the law of the state of the *debtor's location* governs all three choice-of-law issues - how to perfect, the effect of perfection or nonperfection, and priority.

- For *tangible collateral* (goods, instruments, negotiable documents, tangible chattel paper),¹¹⁴ you must distinguish between possessory and nonpossessory security interests.

- For *possessory* security interests in tangible collateral, the law of the jurisdiction where the collateral is located governs all three choice-of-law issues - perfection, the effect of perfection or nonperfection, and priority.¹¹⁵

- For *nonpossessory security interests in tangible collateral*,

- the law of the jurisdiction where the debtor is located governs perfection (this is Revised Article 9's basic choice-of-law rule but limited to where and how to perfect other than by possession)

111. *Id.* § 9-301(2).

112. *Id.* § 9-301(2).

113. *Id.* § 9-301(3)(C).

114. As opposed to electronic chattel paper, R.U.C.C. § 9-102(a)(11), the technology for which has yet to be invented.

115. *Id.* § 9-301(2).

■ the law of the jurisdiction where the collateral is located governs the effect of perfection or non-perfection, and priority.¹¹⁶

So, Revised Article 9's basic choice-of-law rules distinguish between tangible and intangible collateral, and within the category of tangible collateral, the rules distinguish between possessory and nonpossessory security interests. With the exception of possessory security interests (obviously in tangible collateral), the law of the state of the debtor's location governs where and how the creditor perfects.

Crystallizing the basic rules to their essence,

◆ For intangible collateral, the law of the debtor's location governs all three choice-of-law issues - perfection, the effect of perfection or nonperfection, and priority.

◆ For possessory security interests, the law where the collateral is located governs all three choice-of-law issues - perfection, the effect of perfection or nonperfection, and priority.

◆ For nonpossessory security interests in tangible collateral, the law of the debtor's state of location governs perfection. The law where the collateral is located governs the effect of perfection or nonperfection, and priority.

B. WHERE IS A DEBTOR LOCATED?

Because most creditors will file a financing statement to perfect their interest in collateral, most creditors will need to file their financing statements according to the law of the jurisdiction of the debtor's location.

Where is a debtor located? Revised section 9-307 addresses that key issue. It defines the debtor's state of location based on the debtor's status. Revised Article 9 distinguishes between human being-debtors and organization-debtors. "Person" includes individuals and organizations.¹¹⁷ An *individual* is a human being. An organization is either a

116. *Id.* § 9-301(3)(C).

117. U.C.C. § 1-201(30).

registered organization or an organization that does not meet the definition of "registered organization."

A "registered organization" is "an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized."¹¹⁸ Corporations, limited partnerships and limited liability companies are registered organizations. With respect to registered organizations, the phrase "jurisdiction of organization" refers to the law under which the organization organized - i.e., the law of the state where the corporation incorporated or the limited partnership organized.¹¹⁹ General partnerships, informal partnerships, are not registered organizations.¹²⁰

Under Revised Article 9, then, a debtor is (must be) one of three things:

- ◆ an individual,
- ◆ a registered organization, or
- ◆ a business entity that is not a registered organization.

Where are these various types of debtors located?

- An individual debtor is located at the *individual's principal residence*.¹²¹ This is so whether the individual debtor is granting a security interest in consumer or business assets.

Therefore, for nonpossessory security interests in any kind of collateral, the law of the state in which the individual debtor has his or her principal residence governs *perfection*.

- A registered organization is located in the state under whose laws it organized.¹²² So, corporate debtors are located in the state of their incorporation. Limited partnerships are located in the state where they organized.

118. R.U.C.C. § 9-102(a)(70).

119. *Id.* § 9-102(a)(50). "'State' means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States." *Id.* § 9-102(a)(76).

120. *Id.* § 9-102(a)(70) & cmt. 11.

121. *Id.* § 9-307(b)(1).

122. *Id.* § 9-307(b)(c).

Therefore, the law of the state in which the registered organization organized governs *perfection* of nonpossessory security interests in any kind of collateral.

- All other business entities ("organizations"), in particular, informal partnerships, are located in the state in which they have their place of business,¹²³ or if they have more than one place of business, in the state in which they have their chief executive office.¹²⁴

This carries forward old § 9-103(3)'s definition of where-a-debtor-is-located but limits its application to nonregistered organizations. So, if the debtor-business entity is not a registered organization, the debtor is located in the state in which it has its place of business. If it has more than one place of business, it is located in the state of its chief executive office. Therefore, for nonpossessory security interests in any kind of collateral, the law of the state in which the nonregistered organization-debtor has its place of business or chief executive office governs *perfection*.

Revised Article 9's choice-of-law rules and definitions regarding where a debtor is located will reduce the need for creditors to "paper the countryside" when they do their initial filings. It will also reduce the need to re-perfect after the initial filing. Debtors relocate their principal residence, place of business or chief executive office, less often than collateral moves across state lines. Moreover, a registered organization's state of location will remain constant despite its suspension, revocation, dissolution, cancellation, etc.¹²⁵

Revised Article 9 significantly reduces both the hazards and risks of initial filings and the need to re-perfect postfiling. That reduction translates into reduced exposure for security interests in bankruptcy.

Putting sections 9-307 and 9-301 together, what do we have?

Perfection of nonpossessory security interests

Creditors of corporate and limited liability partnership debtors must file or otherwise perfect (e.g., automatic perfection) according to

123. *Id.* § 9-307(b)(2).

124. *Id.* § 9-307(b)(3).

125. *Id.* § 9-307(g).

the law of the debtor's state of organization for all nonpossessory security interests.

Creditors of individual debtors seeking to perfect nonpossessory security interests must file or otherwise perfect according to the law of the state in which the debtor has his or her principal residence. If the debtor has residences in more than one state, the prudent creditor will comply with the perfection laws of both states.

To perfect any nonpossessory security interest, creditors of a nonregistered organization-debtor must file or otherwise perfect according to the law of the state in which the debtor has its place of business, or its chief executive office if it has more than one place of business. If ambiguity exists as to which place of business represents the debtor's chief executive office, the prudent creditor will comply with the perfection laws of all states in which the debtor's chief executive office may exist.

The debtor's state of location is irrelevant to perfect a security interest by possession. For possessory security interests, creditors must comply with the law of the state in which the collateral is located.

What about the choice-of-law rules regarding the *effect of perfection or nonperfection, and priority*?

For *tangible collateral* (negotiable documents, goods, instruments, money and tangible chattel paper):

- the law where the collateral is located controls the effect of perfection, nonperfection and priority.

for *intangible collateral*:

- the law of the debtor's location controls these issues.

Example: Debtor, Inc. incorporated under the laws of State A. Debtor has places of business in States B, C and D. Debtor's chief executive office is in State B. Debtor grants Bank a security interest in its accounts and tangible chattel paper. The chattel paper in question is located in State C. Bank wants to file to perfect its interest in both Debtor's chattel paper and accounts.

Bank must perfect its (nonpossessory) security interest in *both the accounts and chattel paper* according to the law of

State A. State A is Debtor, Inc.'s state of incorporation and the state where Debtor, Inc. is deemed to be located.¹²⁶

If any issue regarding Bank's perfection or nonperfection or priority arises as to the *accounts*, State A's law governs.¹²⁷

If any issue regarding Bank's perfection or nonperfection, or priority arises as to the *chattel paper*, State C's law states the choice-of-law rules because the chattel paper is tangible collateral and the law of the state where the collateral is governs the effect of perfection or nonperfection, and priority regarding tangible collateral.¹²⁸

■ **Same basic facts except Debtor is an individual, sole proprietor, and Debtor resides in State E.**

Bank must perfect its interest in *both the accounts and chattel paper* according to the law of State E, the state of Debtor's principal residence and the state where D is deemed to be located.¹²⁹

If any issue regarding Bank's perfection or nonperfection or priority arises as to the *accounts*, State E's law governs.¹³⁰

If any issue regarding Bank's perfection or nonperfection or priority arises as to the *chattel paper*, State C's law states the choice-of-law rules because the chattel paper is tangible collateral and the law of the state where the collateral is governs the effect of perfection or nonperfection and priority regarding tangible collateral.¹³¹

126. R.U.C.C. § 9-301(1), 9-307(e).

127. *Id.* § 9-301(1).

128. *Id.* § 9-301(3)(C).

129. *Id.* §§ 9-301(1), 9-307(b)(1).

130. *Id.* § 9-301(1).

131. *Id.* § 9-301(3)(C).

■ Same basic facts except Debtor is a informal general partnership.

Bank must perfect its interest in *both the accounts and chattel paper* according to the law of State B, the state of the partnership's chief executive office.¹³²

If any issue regarding Bank's perfection or nonperfection or priority arises as to the *accounts*, State B's law governs.¹³³

If any issue regarding Bank's perfection or nonperfection or priority arises as to the *chattel paper*, State C's law states the choice-of-law rules because the chattel paper is tangible collateral and the law of the state where the collateral is governs the effect of perfection or nonperfection and priority regarding tangible collateral.¹³⁴

● What if Debtor is an individual and grants a purchase money security interest in an entertainment system for use in her home?

For nonpossessory security interests, the law of the state of the debtor's principal residence controls perfection (filing or automatic perfection if recognized).

For possessory security interests, the law of the state where the collateral is governs perfection.

For both possessory and nonpossessory security interests, the law of the state where the collateral is will govern the effect of perfection or nonperfection and priority.

With consumer goods, often, but not always, the debtor's state of principal residence and the state where the goods are located will be the same.

132. *Id.* §§ 9-301(1), 9-307(b)(3).

133. *Id.* § 9-301(1).

134. *Id.* § 9-301(3)(C).

C. FURTHER COMMENTS ON REVISED ARTICLE 9'S CHOICE-OF-LAW RULES

1. Official Comment 3 to revised section 9-301 cautions that the substantive law of the debtor's location, *not* its choice-of-law rules, controls. This seeks to head off colossal problems if Revised Article 9 is not effective in all states as of July 1, 2001.¹³⁵ Whatever problems there are in this vein will be caused by the states who delayed Revised Article 9's effective date beyond July 1, 2001. The problems will be shared by all the states and the District of Columbia.

2. In this world of globalization, what are the rules regarding foreign corporations as debtors? First, a foreign corporation is not a registered organization. The definition of "registered organization" is limited to organizations organized solely under the law of a *single State or the United States*,¹³⁶ and "State" is limited to a state of the United States or territory or insular possession subject to the jurisdiction of the United States.¹³⁷ Second, revised U.C.C. section 9-307(c) addresses where a foreign debtor is located.

The rules stated in revised U.C.C. section 9-307(b), e.g., an individual is located where his/her principal residence is located, an organization at its chief executive office, etc., etc., apply to foreign debtors *if* they are

135. Official Comment 3 amplifies the point.

Example 1: Litigation over the priority of a security interest in accounts arises in State X. State X has adopted the official text of this Article, which provides that priority is determined by the local law of the jurisdiction in which the debtor is located.... The debtor is located in State Y. Even if State Y has retained former Article 9 or enacted a nonuniform choice-of-law rule (e.g., one that provides that perfection is governed by the law of State Z), a State X court should look only to the substantive law of State Y and disregard State Y's choice-of-law rule. State Y's substantive law ... provides that financing statements should be filed in a filing office in State Y. Note, however, that if the identical perfection issue were to be litigated in State Y, the court would look to State Y's former Section 9-103 or nonuniform 9-301 and conclude that a filing in State Y is ineffective.

Example 2: In the preceding Example, assume that State X has adopted the official text of this Article, and State Y has adopted a nonuniform Section 9-301(1) under which perfection is governed by the whole law of State X, including its choice-of-law rules. If litigation occurs in State X, the court should look to the substantive law of State Y, which provides that financing statements are to be filed in a filing office in State Y. If litigation occurs in State Y, the court should look to the law of State X, whose choice-of-law rule requires that the court apply the substantive law of State Y. Thus, regardless of the jurisdiction in which the litigation arises, the financing statement should be filed in State Y.

136. R.U.C.C. § 9-102(a)(70).

137. *Id.* § 9-102(a)(76).

located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.¹³⁸

If the foreign debtor is *not* located in such a jurisdiction, the debtor is located in the District of Columbia.¹³⁹

D. POSTFILING CHANGE IN GOVERNING LAW

What if the debtor relocates postfiling (understanding that registered organizations can never relocate although they can merge)? Revised U.C.C. section 9-316, captioned "Continued Perfection of Security Interest following Change in Governing Law," addresses that issue. It restates a familiar rule. "A security interest perfected pursuant to the law of the jurisdiction designated in Section 9-301(1) . . . remains perfected until" the earlier of expiration of perfection in that jurisdiction or four months after "a change in the debtor's location to another jurisdiction . . ."¹⁴⁰ If the creditor re-perfects according to the law of the debtor's new location before its perfection expires under subsection (a), the creditor's interest remains continuously perfected.¹⁴¹ Assume D, an informal partnership, relocates its chief executive office from State 1 to State 2. C, a secured creditor, had properly filed on D's accounts in State 1. C's financing statement in State 1 has *more than 4 months* of life left to it.¹⁴² C has 4 months to re-perfect according to State 2's laws to maintain uninterrupted perfection and a priority date based on its initial filing in State 1.¹⁴³

138. *Id.* § 9-307(c).

139. *Id.* § 9-307(c).

140. *Id.* § 9-316(a)(1)-(2).

141. *Id.* § 9-316(b).

142. The creditor will have less than 4 months to act in State B if its financing statement filed in State A will lapse in less than 4 months. Of course, the creditor can always file a continuation statement in State A to acquire the full 4 month period to re-perfect in State B. R.U.C.C. §§ 9-515, 9-512(a).

143. *Id.* § 9-322(a)(1) ("Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection").

Using the basic facts above, assume C does not re-perfect its interest in State 2. What is the status of C's interest 6 months after D's relocation to State 2?

According to revised section 9-316(b), "[i]f the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event [described in (a)], it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value." Like former Article 9, the consequences of a failure to re-perfect in State 2 are two-fold. First, C's perfection lapses *prospectively*. This means that as against those who come on the scene after C's lapse in perfection, C is unperfected. If the post-lapse party in competition with C would prevail over an unperfected creditor, it prevails over C.¹⁴⁴ Second, upon lapse, C is deemed *retroactively* unperfected vis-a-vis purchasers of the collateral for value who intervened during C's 4-month period of automatic, continuous perfection in State 2.¹⁴⁵

Assume a judgment creditor (JC) of D who obtains a lien on D's assets in State 2 within 4 months of D's relocation there. Who would have priority, C or JC? JC's lien would remain subordinate to C's interest even though C subsequently let its perfection lapse. C would have priority. A judgment lien creditor is not a purchaser.

What if D petitioned for bankruptcy relief during the 4-month period and thereafter C forgot to re-perfect in State 2? First, the bankruptcy trustee could not avoid C's interest under section 544(a). Revised U.C.C. section 9-316's retroactively-deemed-unperfected rule is limited to *purchasers* for value, i.e., those who take their interest by voluntary transaction.¹⁴⁶ The bankruptcy trustee is a lien creditor.¹⁴⁷ Lien creditors take their interests involuntarily. C would be perfected as of the commencement of the bankruptcy case and therefore immune from section 544(a) strong-arm attack. (If D filed bankruptcy in month 6 and C had failed to reperfect in State 2, C would be unperfected and its interest avoidable under Section 544(a).)

According to the comments, deeming the creditor retroactively unperfected as against a lien creditor "would create substantial and

144. Most competing creditors prevail over an unperfected secured creditor. R.U.C.C. § 9-317. Unsecured creditors do not. *Id.* §§ 9-317, 9-201.

145. R.U.C.C. § 9-316(e).

146. U.C.C. § 1-201(32).

147. R.U.C.C. § 9-102(a)(52)(C).

unjustifiable preference risks."¹⁴⁸ *What* are the revisors talking about? They don't bother to explain but perhaps they were thinking as follows.

Assume the same basic facts as stated above. D petitions for bankruptcy relief in State 2 within C's 4-month period of automatic, continuous perfection based on its State 1 filing. Postpetition, C does not reperfect in State 2. If the retroactive unperfection rule applied to lien creditors, C would be deemed unperfected as of the commencement of D's case. According to 11 U.S.C. § 547(e)(2)(C), if a creditor is not perfected at the commencement of a case, the creditor is deemed perfected "immediately before the date of the filing." Because C's "deemed perfection" would occur more than 10 days after attachment of the security interest, the date of C's "deemed perfection" (immediately before the bankruptcy filing) would be the date of the transfer for purposes of a preference analysis.¹⁴⁹ And that would make C's security interest an avoidable preference. The interest would be a transfer to C on account of an antecedent debt made within 90 days of bankruptcy which improved C's position.¹⁵⁰ By excluding lien creditors from the class of beneficiaries of the retroactive unperfection rule, revised section 9-316(e) eliminates this preference risk.¹⁵¹

Revised section 9-316(a)(3) also deals with an issue former Article 9 does not address. Assume Debtor transfers collateral. The transfer does not cut off the security interest. Under old and new Article 9, the creditor's (C's) filed financing statement under Debtor's, the transferor's, name continues to perfect C's interest even though the collateral is now owned by Transferee.¹⁵² But what if Transferee (Debtor 2)¹⁵³ changes its state of location or Debtor 1 sells to Buyer-Debtor 2 who is

148. *Id.* § 9-316 cmt. 3.

149. 11 U.S.C. § 547(e)(2)(B) (a transfer is deemed to take place at the time of perfection if perfection occurs more than 10 days after the transfer).

150. *Id.* § 547(b).

151. A postfiling change in the state of the debtor's location does create one preference risk. Assume D relocates to State 2 and C only gets around to reperfecting in State 2 in month 8. Within 90 days of C's reperfecting, D petitions for bankruptcy relief. Because C did not file in State 2 within 4 months of D's relocation to State 2, C's perfection lapsed. C's filing in State 2 in month 8 establishes a new perfection date for C. C's filing in month 8 in State 2 also establishes a new date of transfer for preference purposes. 11 U.S.C. § 547(e)(2)(B) (1998) (a transfer is deemed to take place at the time of perfection if perfection occurs more than 10 days after the transfer). Assuming all the other § 547(b) requirements are met, C's security interest constitutes a preference. Thus, the creditor who fails to reperfect in State 2 within the requisite period of time creates preference exposure. Revised Article 9 significantly reduces this preference exposure by reducing the number of situations in which a postfiling change will trigger a need to refile.

152. U.C.C. § 9-402(7); R.U.C.C. § 9-507(a).

153. Remember "debtor" means owner of the collateral, not the person indebted if they are different.

located in another state? According to revised section 9-316(a)(3), C's security interest remains perfected until "the expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction." Therefore, Revised Article 9 gives C a year to find out about the transfer and to re-perfect according to the law of Debtor 2's state of location.¹⁵⁴ But C is not told how it should "re-perfect" in State 2. Is C required to file a financing statement under Debtor 1's name or Debtor 2's name? If Debtor 1's name, what's the point? It does not give meaningful notice to those searching for interests on Debtor 2's assets and who would be searching in State 2 for outstanding claims on Debtor 1's assets? If C is required to file a financing statement listing Debtor 2 as debtor, what leverage does C have? Will Debtor 1's authorization to C to file a financing statement extend to Debtor 2?

Assume C does not act and Debtor 2 files bankruptcy within C's one-year automatic continuous perfection in State 2. Can Debtor 2's bankruptcy trustee avoid C's interest? No, for very the same reasons the trustee could not avoid C's interest when its debtor changed its state of location.¹⁵⁵ What if Debtor 2 files bankruptcy more than a year later? Now C is unperfected and its interest avoidable under Section 544(a).

E. CHOICE-OF-LAW RULES FOR PROPERTY ACQUIRED AFTER A DEBTOR'S CHANGE IN LOCATION

Revised section 9-316, comment 2, provides:

This section addresses security interests that are perfected (i.e., that have *attached* and as to which any required perfection step has been taken) before the debtor changes its location. It does *not apply* to security interests that *have not attached before the location changes*.

154. R.U.C.C. § 9-316(b).

155. *Id.* If C fails to act in State 2, its interest "becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value." The bankruptcy trustee is not a purchaser for value. Therefore, C is perfected as of the commencement of the bankruptcy case. Moreover, C does not risk retroactive unperfection and the potential preference exposure it creates. 11 U.S.C. § 547(e)(2)(C) (1998).

A perfected security interest only exists if it has attached and all the applicable steps for perfection have occurred.¹⁵⁶ Attachment requires the debtor to have rights in the collateral.¹⁵⁷ What if the debtor changes its state of location and thereafter acquires rights in the collateral? According to the above comment, a creditor has no lead time, no grace period whatsoever, to perfect an interest in collateral its debtor acquires *after* relocating to a new jurisdiction. This is not a problem for creditors of corporate debtors because the state of location of those debtors can never change. It is not a big problem for creditors of consumer debtors because they generally cannot take a security interest in after-acquired consumer goods.¹⁵⁸ It may be a HUGE problem for creditors financing sole proprietors and general partnerships because such debtors *can* change their state of location and their creditors can and often do take a security interest in after-acquired collateral. This may be another gold mine for bankruptcy trustees. The prudent creditor will prohibit a nonregistered organization-debtor from relocating to another state without the creditor's prior written consent. Assuming the debtor abides by the security agreement, admittedly a big assumption, the creditor can pre-file in the new jurisdiction. The prudent creditor will also monitor such debtors for unauthorized interstate changes.

IV. FILING RULES

A. INITIAL FINANCING STATEMENTS - REVISED SECTION 9-501

The revisors had mercy on secured creditors. The Lord had mercy on us. Revised Article 9's filing rules themselves are a cake walk. Presumably this will mean, long term anyway, fewer security interests to avoid because of filing mishaps. (Although the filing rules are easy, figuring out which state's filing rules apply is not. Needless to say, if the creditor follows Revised Article 9's filing rules to the T but does so in the wrong state, the creditor's situation is not ideal. It will be lethal if the debtor petitions for bankruptcy relief.)

156. R.U.C.C. § 9-308(a).

157. *Id.* § 9-203(b)(2).

158. *Id.* § 9-204(b)(1) prohibits security interests in after-acquired consumer goods "other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value." This apparently means a consumer can grant a security interest in after-acquired security accounts, security entitlements and commodity contracts. See R.U.C.C. § 9-108 cmt. 5.

For fixture filings and other realty-based collateral, e.g., timber to be cut and as-extracted collateral (minerals), Revised Article 9 requires the creditor to file in the office where one would record a mortgage on real estate. For everything else,¹⁵⁹ the creditor must file centrally in the office designated by the state as official keeper of the state's U.C.C. files.¹⁶⁰

Revised Article 9 eliminates local/central regimes and dual filing requirements. Such filing regimes had no commercial utility and the original drafters knew it when they proposed three alternative sets of filing rules.¹⁶¹ They also knew local clerks were powerful and a proposed law that proposed to take away their revenues might not become law. The original drafters bowed to political reality. The political reality has changed.

B. CONTINUATION STATEMENTS

Revised Article 9 tracks old Article 9's approach to continuation statements with two key exceptions. First, the debtor's insolvency proceeding, state or federal, no longer tolls the creditor's duty to file a continuation statement within the 6-month window prior to lapse of the effectiveness of its filed financing statement. Official comment 4 to revised U.C.C. section 9-515 explains:

Under Former Section 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. Subsection (c) deletes the former tolling provision and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code Section 362(b)(3).

The implications of failing to file a continuation statement postpetition seem limited to the creditor's post-bankruptcy situation. According to the other change, lapse no longer means the creditor is

159. Other than transmitting utilities, see R.U.C.C. § 9-501(b).

160. R.U.C.C. § 9-501(a)(2).

161. U.C.C. § 9-401(4) came in 3 alternatives.

deemed unperfected as against a lien creditor, e.g., the bankruptcy trustee who intervenes during the period of the creditor's perfection. Even if the creditor, postpetition, fails to file a continuation statement and its perfection therefore lapses, it will remain perfected as against the bankruptcy trustee. Revised Article 9's retroactive unperfection rule is limited to purchasers for value: "[i]f the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value."¹⁶² The comments state the obvious: "the provisions of this Article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result."¹⁶³ Because the retroactive unperfection rule no longer applies to lien creditors, the creditor's potential preference exposure is reduced.¹⁶⁴

V. PERFECTION RULES

A. INTRODUCTION

Revised Article 9 recognizes four different methods of perfection:

- ◆ filing,
- ◆ possession,
- ◆ automatic perfection, and
- ◆ control.

Not every perfection method is available to a creditor in any given case. For instance, automatic perfection does not apply to security interests in equipment or most other collateral for that matter.¹⁶⁵ A creditor cannot perfect its interest in an account by possessing it (because no one, not even a Revised Article 9 creditor, can possess intangible collateral).¹⁶⁶

Revised Article 9 makes three important changes in the Article 9 perfection rules.

162. R.U.C.C. § 9-515(c).

163. *Id.* § 9-515(c) cmt. 4.

164. *See supra* notes 149-151 & accompanying text.

165. R.U.C.C. §§ 9-309, 9-310.

166. *Id.* §§ 9-312, 9-310.

1. Revised Article 9 permits a creditor to perfect its interest in an instrument by filing a financing statement.¹⁶⁷
2. It expands the concept of perfection by control to more than investment property.
3. It authorizes electronic filing.

B. FILING ON INSTRUMENTS

Revised section 9-312(a) permits the creditor to file a financing statement to perfect its interest in an instrument. The comments suggest that this rule "is likely to be particularly useful in transactions involving large numbers of notes that a debtor uses as collateral but continues to collect from the makers."¹⁶⁸ It is important here to distinguish between *perfection of an interest* and *priority of that interest*. The creditor who perfects by filing but does not take possession risks subordination to the purchaser for value who takes possession without knowledge that its purchase violates the creditor's rights.¹⁶⁹ One assumes the creditor with an interest in instruments will never rely on filing alone unless possession is simply not feasible. That is, when possible, the creditor will both file and possess. Creditors will want to continue to possess instruments when feasible because their possession means no one else can obtain possession and therefore, no one can defeat their priority claim to the instruments.

Revised section 9-312(a)'s new rule regarding instruments serves principally to shore up the creditor's position in bankruptcy. A precautionary filing covering the debtor's instruments will preclude trustee avoidance of the creditor's interest even though the creditor does not possess the instruments. This safety precaution will prove especially useful to secured creditors when they claim instruments as proceeds of their collateral. A creditor's claim to proceeds is automatically and continuously perfected without further action if "a filed financing statement covers the original collateral, *the proceeds are collateral in which a security interest may be perfected by filing* in the office in which

167. *Id.* § 9-312(a).

168. *Id.* § 9-312 cmt. 2.

169. *Id.* § 9-330(d).

the financing statement has been filed, and the proceeds are not acquired with cash proceeds.¹⁷⁰

Revised section 9-312(a) eliminates yet another source of avoidable security interests.¹⁷¹ After an initial bonanza of unperfected security interests caused by the transition from old to new Article 9, it is going to be slim pickings for bankruptcy trustees.

C. PERFECTION BY CONTROL

A security interest in investment property, deposit accounts, letter-of-credit rights and electronic chattel paper may be perfected by control of the collateral.¹⁷² Control is the *only* form of perfection permitted for security interests in deposit accounts as original collateral,¹⁷³ and for most situations involving letter-of-credit rights.¹⁷⁴

The revisors explain that control of a deposit account serves two functions. Control is a satisfactory substitute for the attachment requirement of an authenticated agreement.¹⁷⁵ It is also the only way to perfect a security interest in a deposit account as original collateral.¹⁷⁶ The concept of control involves or requires the debtor's consent.¹⁷⁷ Revised section 9-104 describes how a creditor obtains control of a deposit account. Control exists only if: (1) the secured creditor is the depository bank in which the account is maintained; *or* (2) the debtor, secured creditor and depository bank have agreed that the bank will follow the creditor's instructions without the debtor's further consent; *or* (3) the creditor becomes the depository bank's customer regarding the account.

As Julian McDonnell observed,

a bank secured lender can be expected to insist on security interests in deposit accounts maintained with it. The bank lender will

170. *Id.* § 9-315(d)(1).

171. *See, e.g.,* Citicorp (USA), Inc. v. Davidson Lumber, 718 F.2d 1030 (11th Cir. 1983) (trustee avoided creditors' interest in certificate of deposit because creditors did not possess it when debtor petitioned for bankruptcy relief).

172. R.U.C.C. § 9-314(a).

173. *Id.* § 9-312(b)(1).

174. *Id.* § 9-312(b)(2).

175. *Id.* § 9-104 cmt. 2.

176. *Id.*

177. *Id.* § 9-203(b)(3)(D) (attachment occurs if value has been given, the debtor has rights in the collateral and the creditor has control of the deposit account *pursuant to the debtor's security agreement*).

automatically have control of such deposit accounts under new § 9-104(a)(1) and will normally have priority over other secured creditors under new § 9-327(3). The debtor may still enjoy access to the account, but the bank will have a perfected interest in the account even though no public disclosure of the interest is required. Presumably, third parties will assume that the debtor's bank accounts are or may be subject to a security interest.¹⁷⁸

He also noted,

"control" is not the functional equivalent of possession with respect to deposit accounts or securities entitlements because control over such assets does not require denying the debtor access to them. The depository bank and the securities intermediary automatically have control over assets which they hold Therefore, these interests must be added to the secret interests permitted by new § 9-309 in assessing the extent to which the Revised Article departs from the public notice policy.¹⁷⁹

D. CONTROL OF ELECTRONIC CHATTEL PAPER, INVESTMENT PROPERTY AND LETTER-OF-CREDIT RIGHTS

Revised section 9-105 describes how a creditor obtains control over electronic chattel paper. As noted, the world has yet to "see" this new form of collateral. Electronic chattel paper requires "a single authoritative copy of the record or records . . . which is unique, identifiable and, except as otherwise provided . . . is unalterable."¹⁸⁰ To date, the technology does not exist to insure a single authoritative copy of a record that is unique, identifiable and unalterable. When that technology exists, creditors can perfect by control by following the steps described in revised section 9-105.

The 1994 revisions to Article 9 accompanying the major overhaul of Article 8 on Investment Securities introduced the concept of perfection through control. Revised section 9-106 describes how a creditor obtains control of investment property. The rules differ depending on the nature of the investment property: is it a certificated security in bearer form, a certificated security in registered form, an uncertificated

178. McDONNELL, *supra* note 92, § 9-104, at 90.

179. *Id.* § 9-314, at 198-99.

180. R.U.C.C. § 9-105(1).

security, or a commodity contract? A creditor can also perfect by filing and in some cases (depending on the collateral), by possession.

Revised section 9-107 describes how a creditor obtains control over letter-of-credit rights.

In addition to enjoying the right to perfect through control, the creditor who perfects by control has priority over the creditor who does not have control.¹⁸¹ Generally speaking, creditors who have control are ranked according to priority in time of obtaining control.¹⁸²

E. ELECTRONIC FILING

Every school child knows that one impetus for revising Article 9 was to permit electronic filing. To facilitate paperless filings, Revised Article 9 does not require the debtor's signature on the financing statement. Does this mean a creditor can file a valid financing statement on a debtor without the debtor's permission, knowledge or consent? No, it does not. A person is only entitled to file an initial financing statement¹⁸³ if "the debtor authorizes the filing in an authenticated record."¹⁸⁴

How does a debtor authorize a filing in an authenticated record? If the security agreement precedes the filing, the debtor's authentication of the security agreement, without more, "authorizes the filing of an initial financing statement . . . covering the collateral described in the security agreement."¹⁸⁵ But what about creditors who "pre-file"? Although Revised section 9-502, Official Comment 3, mentions the

181. *Id.* § 9-327(1) (deposit accounts); *id.* § 9-328(1) (investment property); *id.* § 9-329(1) (investment property).

182. *See, e.g., id.* §§ 9-327(2), 9-328(2)(A).

183. Revised Article 9 simplifies the world of financing statements. There are only two types of statements under Revised Article 9—initial financing statements and amendments. Termination statements and continuation statements are a type of amendment. R.U.C.C. §§ 9-502 through 9-507 detail the ground rules for initial financing statements. R.U.C.C. § 9-512 discusses amendments. An amendment can add or delete collateral or parties, continue or terminate the effectiveness of the filed financing statement, or otherwise change information. R.U.C.C. § 9-512(a). R.U.C.C. § 9-513 discusses when a debtor is entitled to a termination statement and who must do what. R.U.C.C. § 9-510(c) discusses the ground rules for continuation statements.

184. R.U.C.C. § 9-509(a)(1). The same holds true for amendments adding collateral or a debtor. *Id.*

185. *Id.* § 9-509(b)(1). This is trickier than may first appear. Assume the creditor wants to do an "all assets" financing statement. The security agreement grants the creditor a security interest in the debtor's 1998 John Deere tractor. The security agreement only impliedly authorizes the creditor to file a financing statement covering the tractor. The debtor will need to separately authenticate the broader financing statement. The debtor's authentication of the security agreement only authorizes the filing of an initial financing statement covering the collateral described in the security agreement.

possibility of debtor ratification, the prudent creditor will have the debtor sign or otherwise authenticate a record in which the debtor expressly authorizes the creditor to file financing statements covering X collateral, or X and Y type of collateral or "all assets."

F. SIGNIFICANT & OCCASIONALLY CONFUSING REVISED ARTICLE 9 RULES REGARDING FINANCING STATEMENTS

To be valid under Revised Article 9, a financing statement need only give the debtor's (legal)¹⁸⁶ name, the name of the secured creditor or its representative, and "indicate[] the collateral covered by the financing statement."¹⁸⁷ If that is all that Revised Article 9 requires by way of valid financing statement, you might legitimately wonder why the initial financing statement form included in revised section 9-521 asks for considerably more information.

The answer lies in distinguishing between what will suffice legally as a valid financing statement if the filing officer accepts the statement for filing, i.e., does not reject it,¹⁸⁸ and what information is necessary to preclude the filing officer from rightfully rejecting the tendered statement. Revised section 9-516(b) catalogues a host of situations in which the filing officer is justified in rejecting the tendered statement and a valid filing does not occur. For instance, the filing officer can refuse to accept a statement that does not: provide a mailing address for the secured creditor;¹⁸⁹ provide a mailing address for the debtor;¹⁹⁰ or indicate whether the debtor is an individual or an organization.¹⁹¹ In short, the prudent creditor will provide all the information elicited by the new financing statement form or risk filing office rejection of the tendered statement. Valid rejection, of course, means no effective filing, and that, at a minimum, means a later filing date and hence, a later date

186. Revised Article 9 rejects trade name filings. R.U.C.C. § 9-503(c).

187. *Id.* § 9-502(a).

188. *Id.* § 9-502(a).

189. *Id.* § 9-516(b)(4).

190. *Id.* § 9-516(b)(5)(A).

191. R.U.C.C. § 9-516(b) catalogues the filing officer's grounds for rightfully refusing to accept a tendered financing statement. R.U.C.C. § 9-516(b)(5)(C)(iii) authorizes a filing officer to refuse to accept a financing statement that fails to indicate the "organizational identification number for the debtor or [to] indicate that the debtor has none." At a Revised Article 9 conference, one panelist, Laurie Flynn, counsel to the Secretary of State's Office for the Commonwealth of Massachusetts, noted that technically her office could rightfully reject a financing statement that did not indicate "none" in the organizational identification number block.

for perfection with its attendant potential subordination to others and its bankruptcy risks.

Revised Article 9 validates the supergeneric description, e.g., "all assets" or "all debtor's personal property," for the financing statement.¹⁹² That does *not* hold true for security agreement descriptions.¹⁹³

VI. PURCHASE-MONEY SECURITY INTERESTS (PMSIs)

Unlike section 9-107, revised section 9-103 provides a detailed, complicated eight-section definition of pmsi. Revised section 9-103 distinguishes between purchase-money collateral and purchase-money debt. It discusses pmsis in software and establishes, by legislative fiat, that a consignor's security interest in consigned goods is a pmsi in inventory.

In large part, Revised Article 9's rules represent a dedicated attempt to refute, reject, override, eliminate, eradicate and otherwise kill the transformation rule in a commercial debtor context.¹⁹⁴ The transformation rule, a court-made doctrine, only recognizes a pmsi if the creditor can establish a one-to-one correspondence between purchase-money debt and purchase-money collateral.¹⁹⁵ The rule was born in the bankruptcy courts in a consumer debtor setting. It represents a not-so-subtle attempt to protect a debtor's ability to claim his or her exemptions in household goods. 11 U.S.C. § 522(f)(1)(B) (1998) permits debtors to avoid nonpossessory, *non-pmsis* in otherwise exemptible household goods. This debtor avoidance power is limited to non-pmsis. For some courts, cross-collateralization, refinancing or debt consolidation transformed the creditor's pmsi into a non-pmsi. The collateral was no longer securing or no longer just securing purchase-money debt. That, of course, paved

192. *Id.* § 9-504(2).

193. *Id.* §§ 9-203(b)(3)(A), 9-108, 9-504 cmt. 2.

194. R.U.C.C. § 9-103 states rules for non-consumer-goods transactions. R.U.C.C. § 9-103(h) states:

The limitation of the rules in subsections (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

195. See, e.g., *Southtrust Bank v. Borg-Warner Acceptance Corp.*, 760 F.2d 1240 (11th Cir. 1983).

the way for the debtor to avoid the interest and claim his or her exemption in the asset.¹⁹⁶

In *Southtrust Bank v. Borg-Warner Acceptance Corp.*,¹⁹⁷ the Eleventh Circuit applied the transformation rule in a commercial, nonbankruptcy setting, giving the first inventory lender priority to inventory wholly financed by the second lender. It is hard to see what policy, commercial or otherwise, justifies that result. It undermines the point of giving superpriority to pmsi lenders. It actively discourages folks from dealing with debtors if a prior secured lender exists. It defeats the pmsi creditor's reasonable expectations of priority.

The Eleventh Circuit applied the transformation rule again in *Snap-On Tools, Inc. v. Freeman (In re Freeman)*.¹⁹⁸ The court's pronouncements indicate why some thought the floating lien was dead,¹⁹⁹ at least in the Eleventh Circuit:

[F]or the court to enforce a PMSI that consolidates a customer's secured debts, as Snap-On did here, the lender must provide some method for "determining the extent to which each item of collateral secures its purchase money." . . . "[W]ithout some guidelines, legislative or contractual, the court should not be required to distill from a mass of transactions the extent to which a security interest is purchase money." . . . Unless the lender contractually provides some method for determining the extent to which each item of collateral secures its purchase money, it gives up its purchase money status

Payments to Snap-On were to be allocated on a "first in first out" basis as provided for in each agreement This method provides no allocation among sales tax, interest and purchase price although Snap-On must have intended to be paid for all three items. Because the method for allocating the payments made by Freeman is inadequate to determine which tools have been paid for and which secure their own purchase price, Snap-On's security interest does not survive the consolidation of debts.²⁰⁰

196. See, e.g., *In re Hilyard*, 198 B.R. 620 (Bankr. N.D. Ala. 1996); *Parish v. Lincoln Fin. Co.*, 147 B.R. 322 (Bankr. E.D. Mo. 1992).

197. 760 F.2d 1240 (11th Cir. 1983).

198. 956 F.2d 252 (11th Cir. 1992).

199. D. Benjamin Beard, *The Purchase Money Security Interest in Inventory: If It Does Not Float, It Must Be Dead*, 57 TENN. L. REV. 437 (1990).

200. *Snap-On Tools*, 956 F.2d at 260.

It was against this backdrop that the revisors drafted revised section 9-103. Goods (or software) securing a purchase-money obligation incurred with respect to them are "purchase-money collateral."²⁰¹ An obligation constitutes a "purchase-money obligation" if the obligation represents either: (1) all or part of the purchase price of the collateral; or (2) the value given to the obligor to acquire rights in the collateral.²⁰² So, if Bank lends Debtor \$50,000 to buy a cement mixer and takes a security interest in it to secure Debtor's repayment obligation, the cement mixer is purchase-money collateral because it secures a purchase-money obligation. The \$50,000 debt is a purchase-money obligation because Debtor incurred it to acquire the cement mixer. Moreover, both the price of collateral and the value given to enable a debtor to acquire collateral include "sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations."²⁰³

We note, in passing, that revised section 9-103 ends the debate about whether a pmsi in non-goods is possible. Revised Article 9 limits the possibility of a pmsi to goods and software.²⁰⁴ This prevents those enabling a debtor to acquire nongoods, e.g., accounts or chattel paper, to achieve priority over a prior filed creditor. Limiting pmsis to goods (and software) shores up "the position of a first-filed floating lienor"²⁰⁵ regarding nongoods collateral. No one can trump the first filed creditor.

The necessary predicate established by the definitions of "purchase-money collateral" and "purchase-money obligation," revised section 9-103(b) goes on to define "pmsi." A creditor has a pmsi in goods "to the extent that the goods are purchase-money collateral with respect to that security interest."²⁰⁶ Freely translated, to the extent the security interest secures the obligation incurred to acquire the collateral, to that extent, the security interest is pmsi.

Reconsider the cement mixer hypo. Assume the cement mixer not only secures its \$50,000 purchase price but Debtor's obligation to pay

201. R.U.C.C. § 9-103(a)(1).

202. *Id.* § 9-103(a)(2).

203. *Id.* § 9-103 cmt. 3.

204. A pmsi in software is limited to situations in which the creditor is taking a security interest in goods and software in an integrated transaction and the debtor wants an interest in the software for "the principal purpose of using the software in the goods." R.U.C.C. § 9-103(c).

205. MCDONNELL, *supra* note 92, § 9-103, at 85. See also MBank Alamo N.A. v. Raytheon Co., 886 F.2d 1449 (5th Cir. 1989).

206. R.U.C.C. § 9-103(b)(1).

Bank \$100,000 for a delivery truck. Bank would have two security interests in the cement mixer, one pmsi and one non-pmsi. It would have a pmsi to the extent of \$50,000, and a non-pmsi to the extent of \$100,000.

What if the debtor pays down the loan or both loans? Revised section 9-103(e) provides rules for applying payments made. "[T]he payment must be applied in accordance with any reasonable method of application to which the parties agree," e.g., LIFO, FIFO, etc. In the absence of agreement, payments should be applied in accordance with the obligor's manifested intention,²⁰⁷ or failing that, first, to obligations that are unsecured, if more than one obligation is secured, to obligations secured by pmsis in the order in which they were incurred, etc.²⁰⁸

Revised Article 9 abolishes the Transformation Rule in a non-consumer goods setting.²⁰⁹ It codifies (re-codifies?) the "dual status" approach. Revised section 9-103(e)'s formulae and rules for applying payments made enable the creditor to establish the extent to which its security interest is pmsi and non-pmsi.

Revised Article 9 goes even further in the inventory context. A security interest is pmsi

if the security interest is in inventory that is *or was* purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds *or held* a purchase-money security interest;²¹⁰

Revised section 9-103(b)(2) effectively exempts the inventory pmsi lender from keeping track of payments made and/or allocating them to items of financed inventory according to some formula *if all obligations owing are or once were purchase-money obligations and all collateral is or once was purchase-money collateral*. If the inventory is, or at some point, was purchase-money collateral (it secures, or once secured, a purchase-money obligation), the lender has a pmsi in it to the extent it secures a purchase-money obligation with respect to *other inventory* in which the creditor has or had a pmsi. So, all purchase-money inventory

207. *Id.* § 9-103(e)(2).

208. *Id.* § 9-103(e)(3).

209. *Id.* § 9-103 cmt. 7 ("this Article rejects the "transformation" rule adopted by some cases, under which any cross-collateralization, refinancing or the like destroys the purchase-money status entirely.").

210. *Id.* § 9-103(b)(2).

secures all purchase-money obligations incurred to acquire the inventory and the creditor's security interest in all the inventory is purchase-money to the extent it secures any purchase-money obligation! Revised Article 9 seems to give the pmsi inventory lender complete protection if it finances only the debtor's acquisition of inventory and limits its security interest to the inventory financed. If the debtor does not incur any non-purchase-money obligations and the creditor's security interest is limited to collateral it financed, it does not seem possible for the inventory lender to have a non-pmsi.²¹¹

One commentator summarized the effects of revised section 9-103(b)(2) as follows:

Revised Article 9 . . . permits cross-collateralization of purchase-money inventory advances so that the total of the purchase-money inventory advances from the same supplier or lender may be secured by successive shipments of the purchase-money collateral from the same supplier or financed by the same lender.²¹²

Revised Article 9's rejection of the transformation rule is limited to the non-consumer context. Courts are free to do whatever they want in the consumer goods context.²¹³

211. As noted, "purchase-money obligation" includes finance charges, taxes, etc. The comments provide the following example and explanation which help to distinguish Revised Article 9's treatment of pmsi in inventory from pmsi in other types of goods.

Seller (S) sells an item of inventory (Item-1) to Debtor (D), retaining a security interest in Item-1 to secure Item-1's price and all other obligations, existing and future, of D to S. S then sells another item of inventory to D (Item-2), again retaining a security interest in Item-2 to secure Item-2's price as well as all other obligations of D to S....

Under subsection (b)(2), S's security interest in Item-1 securing Item-2's unpaid price would be a purchase money security interest. This is so because S has a purchase-money security interest in Item-1, Item-1 secures the price of (a "purchase-money obligation incurred with respect to") Item-2 ("other inventory"), and Item-2 itself was subject to a purchase-money security interest. Note that, to the extent Item-1 secures the price of Item-2, S's security interest in Item-1 would not be a purchase-money security interest under subsection (b)(1). The security interest in Item-1 is a purchase-money security interest under subsection (b)(1) only to the extent that Item-1 is "purchase-money collateral," i.e., only to the extent that Item-1 "secures a purchase-money obligation incurred with respect to that collateral (i.e., Item-1).

R.U.C.C. § 9-103 cmt. 4, Example.

212. Edwin E. Smith, *Overview of Revised Article 9*, 73 AM. BANKR. L.J. 1 (1999).

213. R.U.C.C. § 9-103(h) ("the limitation of the rules in subsections (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions").

VII. TRANSITION RULES

A. SOME STATES OLD, SOME STATES NEW

Promulgation of Revised Article 9 posed two distinct sets of "transition" issues: 1) how to effect a (smooth) transition from old to new regime that was fair to existing creditors; and 2) what to do if Revised Article 9 was the law in some states, but not in others. On the latter issue, the drafters predicted dire consequences, but offered few solutions. One supposes the specter of horrors was designed to goad all states to adopt Revised Article 9. The Official Comment to revised section 9-701 states:

While always important, uniformity is essential to the success of this Article. If former Article 9 is in effect in some jurisdictions, and this Article is in effect in others, horrendous complications may arise. For example, the proper place to file to perfect a security interest (and thus the status of a particular security interest as perfected or unperfected) would depend on whether the matter was litigated in a State in which former Article 9 was in effect or a State in which this Article was in effect. Accordingly, this section contemplates that States will adopt a uniform effective date for this Article. Any one State's failure to adopt the uniform effective date will greatly increase the cost and uncertainty surrounding the transition.

Beyond the warning that warted toads would fall from the sky if all states did not enact Revised Article 9 effective July 1, 2001, the drafters put their heads in the sand.²¹⁴ Bradley Smith, chair of the Transition Task Force, noted that Revised Article 9 did not and could not address this transition problem, although he believed it would undoubtedly arise because some states would not enact the new law by July 1, 2001.²¹⁵ Although all states have adopted Revised Article 9, some have delayed its effective date beyond July 1, 2001 to permit their filing offices to

214. We exaggerate somewhat. Revised Article 9's choice-of-law provisions address the issue in part by directing courts to apply the substantive law of the jurisdiction, not its choice-of-law rules. See R.U.C.C. § 9-301 cmt. 3 & Section III, *supra*.

215. Bradley Y. Smith, *New Article 9 Transition Rules*, 74 CHI.-KENT. L. REV. 1339, 1352-53 (1999). Mr. Smith was a member of the Article 9 Drafting Committee and chaired the Transition Task Force. *Id.* at 1354 n.1.

gear up for the new world order.²¹⁶ These states must assume full responsibility for any and all horrendous complications that arise from a temporary lack of uniformity of law among the states.

What dreadful, albeit short-lived, complications can we expect? Mr. Smith explains it as follows: assume

D is a corporation organized under the law of State X with its chief executive office located in State Y. The collateral is accounts. Litigation concerning perfection of the security interest is commenced in 2002. At that time, Revised Article 9 is in effect in State X but Old Article 9 is in effect in State Y. The applicable law governing perfection depends upon the selection of the forum state. If the forum is in State Y (or any other state in which Old Article 9 is in effect), then Former section 9-103(3) will make the law of State Y the law governing perfection with a consequent requirement to file in State Y. If, however, the forum is located in State X (or any other state in which Revised Article 9 is in effect), perfection will be governed by the law of State X with a consequent requirement for filing in that jurisdiction. The disparity in result obviously creates a potentially huge incentive for forum shopping so long as Old Article 9 remains in effect in any relevant jurisdiction.²¹⁷

Smith notes the risk of forum shopping is somewhat reduced because Old Article 9 defers to the law of the designated jurisdiction including its choice-of-law rules. Thus, "the choice of a forum state governed by Old Article 9 will change the result in our hypothetical only if the jurisdiction determined pursuant to Former section 9-103(3) is also governed by Old Article 9."²¹⁸ If the forum state defers to the law of a state that has enacted Revised Article 9, you will get the same result whether suit is instituted in the forum state or not. So, he illustrates, switch the states. Old Article 9 is in effect in State X and Revised Article 9 is in effect in State Y. If suit is instituted in State X (where old Article 9 is in effect), State X will defer to State Y because the debtor's chief

216. Connecticut (effective October 1, 2001); Alabama, Florida, and Mississippi (effective January 1, 2002).

217. Smith, *supra* note 215, at 1353.

218. *Id.*

executive office is in State Y.²¹⁹ According to State Y's *choice-of-law rules*,²²⁰ State X governs where and how in State X to perfect a security interest in accounts.²²¹

We assume well-advised secured creditors will "take the fork in the road" until all is perfect in the most perfect of all perfect worlds and Revised Article 9 is the law in every jurisdiction. Those seeking to file will comply with old and new Article 9's perfection rules. Those searching will search under both systems. Perfection according to both sets of rules will immunize the security interest from Section 544(a) strong-arm attack.

While states continues to operate under "former" Article 9, will their Secretary of State's Offices reject financing statements regarding debtors whose mailing address or chief executive office is in another state? We think not. In the Commonwealth of Massachusetts, for instance, the Secretary of State's Office is very familiar with Revised Article 9 and understands its choice-of-law rules.²²² Presumably it will accept such filings.²²³

B. FROM OLD TO NEW SMOOTHLY AND FAIRLY: INTRODUCTION

All of Part 7 of Revised Article 9 is devoted to the task of providing a smooth transition from old to new with time for creditors to adjust to the new regime. As one participant noted,

[t]he transition provisions reflect a policy that [Revised Article 9's changes relating to perfection of a security interest] should not unfairly defeat the rights of a secured party. This policy, however, is tempered by the need ultimately for all parties to be playing by the same set of rules—i.e., the uniform application of the require-

219. U.C.C. § 9-103(3)(b).

220. R.U.C.C. §§ 9-301(1), 9-307(e).

221. *Id.*

222. Laurie Flynn, counsel to the Secretary of State's Office for the Commonwealth of Massachusetts, spoke at a Massachusetts Continuing Legal Education program on June 18, 2001. Her presentation established that the Office is both knowledgeable about and prepared for the advent of Revised Article 9.

223. Moreover, the filing offices may follow some of Revised Article 9's rules even though it is not yet in effect. For instance, Revised Article 9 posits an exclusive list of circumstances under which a filing office can (and must) reject a tendered financing statement. R.U.C.C. §§ 9-520(a), 9-516(b). Those circumstances do not include financing statements covering debtors with out-of-state mailing addresses.

ments of Revised Article 9. The transition provisions strike a balance between these competing considerations.²²⁴

Part 7, "Transition," consists of 8 provisions. The first provision, section 9-701, states in full: "This [Act] takes effect on July 1, 2001." You might think: "*That* wasn't bad. How hard could 7 other provisions be?" Can you say, "VERY hard, as in turn-your-hair-white, severe-stress-to-the-central-nervous-system, worse-than-the-most-inscrutable-Tax-Code-provision HARD?"

Revised section 9-702(a) states the overarching "transition" rule:

Except as otherwise provided in this part, this [Act] applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this [Act] takes effect.

Freely translated, Revised Article 9 governs *every* transaction or lien *within its scope*, whether the transaction or lien occurred before or after Revised Article 9's effective date, *unless a transition rule provides otherwise*. Unpacked and laid out, this sentence establishes that the transition rules address three different categories of transactions:

#1. transactions entered into AFTER Revised Article 9's effective date and within its scope - that is, NEW or *post-effective date* Article 9 transactions;

#2. PED transactions and liens NOT governed by old Article 9 but within Revised Article 9's scope; and

#3. PED transactions governed by former Article 9.

C. POST-EFFECTIVE DATE (NEW) TRANSACTIONS

Revised section 9-701, delaying Revised Article 9's effective date until July 1, 2001, is the only "transition rule" for post-effective date transactions and liens within Revised Article 9's scope. There is no transition period, *after* the effective date, for players to adjust to the new rules of the game. Transactions within Revised Article 9's scope that

224. Smith, *supra* note 215, at 1348.

occur after its effective date are subject to its rules.²²⁵ So, players playing *after* the effective date need to know Revised Article 9's rules before they go out onto the field. The distinction between transactions within or beyond old Article 9's scope is irrelevant. Revised Article 9 governs ALL post-effective date transactions within its scope -- period, end of sentence. So the creditor who, post-effective date, wants to take and perfect a security interest in a John Deere tractor or IBM's inventory of computers is subject to Revised Article 9 as is the buyer who, post-effective date, buys any right to payment that qualifies as a Revised Article 9 account or the creditor who takes a security interest in any right to payment that qualifies as a Revised Article 9 account. Ill-advised and/or clueless secured creditors, true-blue consignors, agricultural lienors, etc., are all going to be cannon fodder for bankruptcy trustees.

D. PRE-EFFECTIVE DATE ("PED") TRANSACTIONS & LIENS

In addition to post-effective date transactions and liens within its scope, Revised Article 9 applies to two different types of PED transactions: 1) transactions governed by former Article 9; and 2) transactions that were not governed by former Article 9 but which would have been governed by Revised Article 9 had they occurred *after* its effective date. This is subject to one exception. Revised Article 9 does *not* affect PED transactions subject to litigation pending at the time it became effective.²²⁶

1. PED Transactions & Liens Not Governed by Former Article 9 that Would Have Been Governed by Revised Article 9 Had They Occurred after Its Effective Date

Revised Article 9 provides special rules for PED non-Article 9 transactions that would have been subject to Revised Article 9 had they occurred after its effective date, e.g., PED agricultural liens, consignments, security interests in commercial deposit accounts, commercial tort claims, etc. First, it recognizes and respects such PED non-Article 9 transactions and liens *if* they were *validly* entered into or created

225. R.U.C.C. § 9-702(a) ("Except as otherwise provided in this part, this [Act] applies to a transaction or lien within its scope . . .").

226. "This [Act] does not affect an action, case, or proceeding commenced before this [Act] takes effect." R.U.C.C. § 9-702(c).

PED.²²⁷ Second, along with blessing the rights, duties and interests flowing²²⁸ from such PED non-Article 9 transactions, Revised Article 9 gives parties a choice regarding their post-effective date conduct. They can terminate, complete, consummate or enforce their rights according to Revised Article 9 or the non-Article 9 law that governed them PED.²²⁹

2. PED Transactions Subject to Former Article 9

The remainder of Part 7,²³⁰ and hence, the bulk of the transition rules, is devoted principally to PED Article 9 transactions.²³¹ Because Revised Article 9 governs *all transactions* and liens *within its scope even if the transaction or lien arose PED*, PED Article 9 creditors need to know

1. the status, post-effective date, of their PED interests;
 2. what, if anything, they need to do, post-effective date, to preserve or continue their PED interests;
 3. if they need to do something, how long they have to do it, and what they need to do;
- and
4. the applicable priority rules.

Two distinctions are key to understanding the transition rules for PED Article 9 security interests:

227. R.U.C.C. § 9-702(b)(1) ("transactions and liens that were not governed by [former Article 9], were validly entered into or created before this [Act] takes effect, and would be subject to this [Act] if they had been entered into or created after this [Act] takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after this [Act] takes effect; . . .").

228. *Id.* § 9-702(b)(1).

229. *Id.* § 9-702(b)(2).

230. *Id.* §§ 9-703 through 9-708.

231. We say "principally" because some of the discussion that follows applies with equal force to PED non-Article 9 security interests.

1) the distinction between a perfected and an unperfected PED security interest; and

2) within the category of perfected PED interests, the distinction between a security interest perfected by filing and any other perfected interest.

a. Creditors Holding *Perfected* Security Interests on Effective Date of Revised Article 9

The Long & the Short of It: The rules here are complicated. We *think* we have figured them out. We offer the following brief summary as a navigation guide.

The creditor whose security interest was perfected immediately before Revised Article 9 takes effect holds a perfected interest under Revised Article 9.²³² The real issue is how long the creditor enjoys perfection post-effective date when its interest does not comply with Revised Article 9's enforceability and/or perfection rules. If the creditor's perfection is based on a filing, the creditor has *the earlier of* the time its perfection would have ceased to be effective under the law of the jurisdiction governing perfection according to former Article 9 or June 30, 2006 to reperfect according to Revised Article 9's rules.²³³ If the creditor's perfection is based on something other than a filing, it has one year after the effective date to conform to the new regime.²³⁴

The "Long" of It - Creditors whose PED perfection steps also comply with Revised Article 9: *All* PED creditors have a perfected security interest under Revised Article 9 *if* they had an enforceable security interest that would have enjoyed priority over a lien creditor immediately *before* Revised Article 9 took effect.²³⁵ This is so whether or not the interest *satisfied Revised Article 9's requirements* for

232. R.U.C.C. § 9-703.

233. *Id.* § 9-705(c).

234. *Id.* § 9-703(b).

235. *Id.* § 9-703(a) speaks of "a security interest that ... would have priority over the rights of a person that becomes a lien creditor." Why didn't the revisors just say "*perfected* security interest," which is far less cumbersome? The word "perfection" is an Article 9 term of art. Technically, it does not apply to non-Article 9 security interests. But R.U.C.C. § 9-703 governs both PED Article 9 security interests and non-Article 9 transactions and liens. For ease of expression, we use the term "perfected" colloquially to refer to all interests that would have priority over a subsequent lien creditor.

enforceability and perfection when Revised Article 9 took effect.²³⁶ So, the PED interest that is "perfected" immediately before Revised Article 9's effective date continues perfected under Revised Article 9.

What if the creditor's PED actions to perfect under old Article 9 would also satisfy Revised Article 9's perfection requirements?²³⁷ Then, the creditor need do nothing further according to revised U.C.C. section 9-703(a).²³⁸ This is not to say the creditor can retire to the billiards room and drink sherry for the duration. Revised U.C.C. section 9-703(a) is simply saying the PED creditor does not need to do anything further *to make the transition into Revised Article 9*. The "transition" is complete on Revised Article 9's effective date. The creditor is subject to the new game rules without further ado. But the new rules, like the old ones, may require creditor protective action. For instance, even the bionic Revised Article 9 security interest has a fixed life of 5 years in most cases.²³⁹ This means the PED Article 9 creditor, now fully anointed Revised Article 9 creditor, must file a continuation statement according to the Revised Article 9 rules if it wants to continue the effectiveness of its PED filed financing statement.²⁴⁰ It must refile according to Revised Article 9's rules to maintain its perfected status following a change in the debtor's state of location²⁴¹ or name,²⁴² etc.

The "Long" of It—Creditor whose PED perfection steps do NOT comply with Revised Article 9: What if the creditor's PED acts do *not* satisfy Revised Article 9's rules regarding attachment and/or perfection?

Then, the creditor must act post-effective date. It must comply with Revised Article 9's perfection steps. The time frame for such action will depend on whether the PED creditor perfected by filing or some other means. According to revised section 9-703(b), creditors who perfected by means other than filing have one year from Revised Article 9's

236. R.U.C.C. § 9-703(a) & (b).

237. See *id.* § 9-703(a). "Perfection" or the "perfection requirements" includes both the requirements of enforceability (attachment) and the applicable steps for perfection. U.C.C. § 9-303(1); R.U.C.C. § 9-308(a).

238. R.U.C.C. § 9-703(a) provides:

A security interest that is enforceable immediately before this [Act] takes effect and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this [Act] if, when this [Act] takes effect, the applicable requirements for enforceability and perfection under this [Act] are satisfied without further action.

239. R.U.C.C. § 9-515(a).

240. *Id.* § 9-515(c).

241. See, e.g., R.U.C.C. § 9-316 (effect of change in governing law on perfection).

242. *Id.* § 9-507(c) (seriously misleading change in debtor's name).

effective date to conform to Revised Article 9's attachment and/or perfection rules. What about PED creditors who perfected by filing? Their perfection will last until the earlier of the time their financing statement would have ceased to be effective under the law of the jurisdiction that governed perfection according to old section 9-103 or June 30, 2006.²⁴³

Revised section 9-703(b)'s "one-year" rule for PED creditors who perfected by means other than a filing: Revised section 9-703 provides in part:

(b) Continuing Priority over lien creditor: perfection requirements not satisfied.

Except as otherwise provided in Section 9-705, if, immediately before this [Act] takes effect, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this [Act] are not satisfied when this [Act] takes effect, the security interest:

(1) is a perfected security interest for one year after this [Act] takes effect;

(2) remains enforceable thereafter only if the security interest becomes enforceable under Section 9-203 before the year expires; and

(3) remains perfected thereafter only if the applicable requirements for perfection under this [Act] are satisfied before the year expires.²⁴⁴

As this provision underscores, the PED perfected creditor can lose its perfected status post-effective date in one of two ways. It can either fail to comply with Revised Article 9's enforceability requirements, i.e., the requirements for attachment (revised section 9-203), or it can fail to comply with its perfection rules.

Given that Revised Article 9's attachment requirements resemble those of former Article 9, how could a PED perfected Article 9 creditor manage to lose its security interest post-effective date? We do not think it will happen often. The comments give two examples. Official Comment 2 to revised section 9-703 describes the consumer debtor who grants a security interest in "all her securities accounts." Revised

243. *Id.* § 9-705(c).

244. *Id.* § 9-703(b).

section 9-108(e)(2), detailing Revised Article 9's description requirements, says a description by type of Article 9 collateral is insufficient when describing "consumer goods, a security entitlement, a securities account, or a commodity account" in a consumer transaction.²⁴⁵ Because a security interest is not enforceable (does not attach) unless the security agreement adequately describes the collateral, and Revised Article 9 says "all securities accounts" is an inadequate description, the creditor has not complied with Revised Article 9's requirements for enforceability. Unless the creditor, within one year of Revised Article 9's effective date, gets the debtor to authenticate a new security agreement that adequately describes the collateral, the creditor will lose its security interest. It will *detach* by operation of law. (The revisors do not describe how the creditor persuades the debtor to authenticate a new security agreement. With luck, the existing security agreement will contain a debtor covenant to execute any documents necessary to protect the creditor's interest and a clause defining "default" to include breach of any covenant.)

The Official Comments also describe an *oral* agreement to sell a payment intangible (or promissory note), noting that an oral agreement does not satisfy Revised Article 9's requirements for attachment.²⁴⁶ Revised Article 9 requires an authenticated security agreement. Will the buyer's failure to obtain one within one year of Revised Article 9's effective date cause the buyer to lose its ownership interest? Arguably no, because a PED non-Article 9 transaction can be terminated, completed, consummated and enforced under "the law that would otherwise apply if Revised Article 9 had not taken effect."²⁴⁷ But the buyer may want the protection and safety of Revised Article 9's rules in which case it will behoove the buyer to obtain the necessary authenticated security agreement from the seller.

Revised section 9-703, Official Comment 3, raises an important issue. What if the PED security agreement uses a Code term of art to describe the collateral and Revised Article 9 redefines the term? For instance, "account" under former Article 9 was limited to rights to payment for goods sold or leased, or services rendered.²⁴⁸ The Revised Article 9 definition includes rights to payment for *any kind of*

245. Ditto for commercial tort claims. *Id.* § 9-108(e)(1).

246. *Id.* § 9-703 cmt. 1.

247. R.U.C.C. § 9-702(2).

248. U.C.C. § 9-106.

property—real estate and intangible property as well as goods—sold, leased, or licensed as well as lottery winnings.²⁴⁹ Assume Debtor's PED security agreement grants Creditor a security interest in "all its current and after-acquired accounts?" Will Creditor's collateral under Revised Article 9 include Debtor's lottery winnings or rights to payment for real estate sold? The comments instruct that standard rules of contract interpretation will govern construction of the parties' agreement. Absent special language or other circumstances, however, if parties use Code terms of art to describe collateral, it is presumed that they intend the defined meaning. "The [PED] agreement of the parties presumptively create[s] a security interest in 'accounts' as defined in former Article 9."²⁵⁰ In Debtor's subsequent bankruptcy proceeding, the trustee could challenge Creditor's assertion of a security interest in Debtor's lottery winnings or its right to receive payment from the sale of real estate.

What might the creditor do in such a situation? It has two choices. Post-effective date, it could re-do the loan documents using the terms as newly defined by Revised Article 9. It could also re-do the loan documents pre-effective date, describing the collateral as "'accounts' as defined in the UCC Article 9 of [State X], *as that definition may be amended from time to time.*"²⁵¹

How might a PED perfected creditor lose its perfected status under Revised Article 9 as a result of something other than the failure to file a financing statement according to Revised Article 9's perfection rules? Revised section 9-703, Official Comment 2, example 2, discusses the PED bailee in possession of instruments, who has received notification of the secured creditor's claim. That was sufficient to perfect a creditor's interest under former Article 9.²⁵² It is *not* sufficient under Revised Article 9. Revised Article 9 requires the bailee to acknowledge that it holds for the creditor.²⁵³ The creditor who wishes to continue its perfected status beyond one year after Revised Article 9's effective date needs to obtain, within that one-year period, the bailee's acknowledgment that it holds the collateral for the creditor.

Does this "one-year-after-the-effective-date-to-act" rule also apply to the creditor with a PED perfected security interest in the debtor's lottery winnings or rights to payment from licenses or real estate, etc.,

249. R.U.C.C. § 9-102(a)(2).

250. *Id.* § 9-703 cmt. 3, Example 3.

251. *Id.*

252. U.C.C. § 9-305.

253. R.U.C.C. § 9-313.

etc., who filed a financing statement covering "general intangibles?" A financing statement listing "general intangibles" would not perfect the creditor's interest under Revised Article 9 because Revised Article 9 classifies such rights as accounts. But revised section 9-703 and its one-year rule do not govern because the situation involves perfection by filing. Revised section 9-705 applies.

PED Creditors Who Perfected by Filing:

a) How Long to Act?

Revised section 9-705 is captioned "Effectiveness of action taken before effective date." Our discussion focuses on the effectiveness under Revised Article 9 of financing statements filed PED.²⁵⁴

Three possible permutations exist:

#1. financing statements filed PED that comply with the perfection requirements of both old and new Article 9;

#2. financing statements filed PED that comply with new Article 9 but not old Article 9; and

#3. financing statements filed PED that comply with old Article 9 but not new Article 9.²⁵⁵

Revised section 9-705(b) states the governing rule for situations 1 and 2. A financing statement filed PED is effective to perfect a security interest under Revised Article 9 *to the extent it satisfies Revised Article 9's perfection requirements*. This includes PED filings that complied with old Article 9's perfection rules *and* those that were ineffective to perfect the creditor's interest under former Article 9. This rule encouraged creditors to comply with Revised Article 9's perfection rules before Revised Article 9 became effective. PED filings that comply with

254. We just discussed the effect of PED action other than filing on interests that only attach post-effective date.

255. A fourth possibility exists, of course, a financing statement filed PED that does not comply with either old or new Article 9. We can say about that creditor what they said about Austria between the two World Wars: In Germany, the situation is serious but not hopeless. In Austria, the situation is hopeless, but not serious.

Revised Article 9 but not old Article 9 become effective the minute Revised Article 9 becomes effective.²⁵⁶

Revised section 9-705(b)'s validation of PED filings that were ineffective at the time they were made covers a gamut of filings:

The secured party may have consciously decided to "pre-file" in the filing jurisdiction mandated by Revised Article 9 before it was necessary or legally effective to do so. Alternatively, such a filing may simply have been made in error. In addition, descriptions of collateral which were ineffective either generally or as to particular types of collateral may become effective under Revised Article 9. Subsection (b) gives effect to all such filings, whether to the calculated or serendipitous benefit of the secured party.²⁵⁷

What about situation #3, PED financing statements that perfected a creditor's interest under former Article 9, but which do not satisfy Revised Article 9's filing requirements? According to revised section 9-705(c), Revised Article 9 does not render them ineffective but, with certain exceptions, they cease to be effective as of the earlier of June 30, 2006 or the time the PED financing statement would have ceased to be effective according to the (former) law of the jurisdiction where it was filed.²⁵⁸

Recall that revised section 9-705(c) is an exception to revised section 9-703's general rule that a PED perfected creditor has one year to conform to Revised Article 9's attachment and perfection rules. This exception governs PED security interests that were *perfected* PED by a *filing* in compliance with former Article 9. In such cases, the PED creditor must reperfect according to Revised Article 9's rules within the earlier of the time its perfection would have expired according to former Article 9 or June 30, 2006. The PED perfected-by-filing creditor will have less than one year to act in some cases and more than one year to reperfect according to Revised Article 9's rules in others.²⁵⁹

For instance, assume SP, PED, properly perfects by a filing in State X on August 1, 2000. Revised Article 9 becomes effective in State X

256. According to R.U.C.C. § 9-705, cmt. 3, "[w]hen this Article takes effect, the filing becomes effective to perfect a security interest." This makes sense. A PED filing that failed to comply with former Article 9 has no legal significance. It can only have legal significance when the law recognizing its significance becomes effective.

257. *Id.* at 1341-42.

258. R.U.C.C. § 9-705(c).

259. *Id.* § 9-705 cmt. 4.

and State Y on July 1, 2001. Perfection under Revised Article 9 would require SP to file centrally in State Y. Absent further facts, SP's security interest remains perfected until July 31, 2005, the end of its 5 year life according to State X's former Article 9.²⁶⁰ It would have a little over 4 years to comply with Revised Article 9's filing rules.

Assume instead that SP, PED, properly perfected by a filing in State X. On July 1, 2001, the effective date of Revised Article 9, SP's filed financing statement has 7 months "to go." (Because 7 months prior to lapse is outside the 6-month window for filing a valid continuation statement,²⁶¹ SP cannot continue the effectiveness of its financing statement under old Article 9 before July 1, 2001.) SP has 7 months to comply with Revised Article 9's perfection rules. At the end of 7 months, its financing statement would have ceased to be effective under the law of the jurisdiction in which it was filed. (Had July 1, 2001 fallen within SP's 6-month window to file a continuation statement under former Article 9 *and* SP had timely filed a valid continuation statement PED, it would have close to 5 full years to "transition" into Revised Article 9, i.e., to comply with Revised Article 9's perfection rules.

Revised section 9-705(c) means prudent searchers, post-effective date, cannot search on the basis of Revised Article 9's filing rules alone. Until June 30, 2006, they must look for outstanding claims according to the old and new filing rules. Revised section 9-705(c)(2)'s absolute cut off date of June 30, 2006 limits this burden to 5 years.²⁶²

b) What the PED Perfected-by-Filing Creditor Should Do?

The creditor who perfected by filing PED could simply reperfect according to Revised Article 9's rules. It could reperfect before or after Revised Article 9's effective date. But reperfecting will not preserve the priority date established by its PED filing. If it chooses to reperfect, it will lose that priority date once its PED financing statement ceases to be effective according to the law of the jurisdiction in which it was filed. It will have a new priority date based on the date it reperfected according

260. What if SP's collateral were ordinary goods, requiring a filing in State X, the law of the state where the goods are, but on July 2, 2001, one day after Revised Article 9's effective date, the debtor moves the goods to State Z? The question was raised on the UCC List-Serv. Steven Weise reasoned that the creditor would have 4 months to perfect according to Revised Article 9's perfection rules because SP's PED filing in State X would cease to be effective under the law of State X 4 months after the goods were brought into and kept in State Z.

261. U.C.C. § 9-403(3).

262. R.U.C.C. § 9-705, cmt. 4.

to Revised Article 9's rules. The prudent perfected-by-filing creditor will want to continue the effectiveness of its PED filed financing statement.

How does a PED perfected creditor continue the effectiveness of its PED filed financing statement?

It depends. Assume the creditor's PED filing complies with Revised Article 9's filing requirements. That is, PED, the creditor files its financing statement in the state and in the relevant office designated by Revised Article 9.²⁶³ The content of the filed financing statement satisfies Revised Article 9's requirements.²⁶⁴ In that case (and only in that case), the creditor can continue the effectiveness of its filed financing statement by filing a "true" continuation statement.²⁶⁵

For example, assume D, Inc., incorporated in California, has its chief place of business in California. PED, Creditor takes a security interest in D, Inc.'s rights to receive payment for goods sold ("accounts" under old and new Article 9). Creditor files centrally in California. The financing statement gives the correct legal names and addresses of the debtor and creditor and lists accounts. Creditor holds a PED perfected security interest in D, Inc.'s accounts. Its PED actions to perfect also comply with Revised Article 9's perfection requirements.²⁶⁶ Therefore, post-effective date, Creditor can continue the effectiveness of its filed financing statement by filing a continuation statement within the 6-month period preceding lapse of its PED financing statement.²⁶⁷ By continuing the effectiveness of its filed financing statement, of course, Creditor also preserves the priority date established by its PED filing.

Now assume the creditor's PED filing does *not* comply with Revised Article 9's filing requirements. Revised Article 9 would require the creditor to file in a different state or a different office within the

263. See R.U.C.C. §§ 9-301, 9-307, 9-501.

264. See Part V of Revised Article 9.

265. "A financing statement filed before the effective date of this Article may be continued only by filing in the State and office *designated by this Article*." R.U.C.C. § 9-705 cmt. 5.

266. Although R.U.C.C. § 9-521's form financing statement elicits much more information than that required under former Article 9, R.U.C.C. § 9-502(a) establishes that a filed financing statement is sufficient if it provides the name of the debtor, the name of the secured party or a representative and indicates the collateral covered. Most financing statements filed PED that perfect a creditor's interest will satisfy R.U.C.C. § 9-502(a). We say "most" because some cases interpreting former U.C.C. § 9-402(7) recognized the validity of a trade name filing. See, e.g., *Brushwood v. Citizens Bank (In re Glasco)*, 642 F.2d 793 (5th Cir. 1981). Revised Article 9 overrides that case law. R.U.C.C. § 9-503(a).

267. R.U.C.C. § 9-515(d).

state.²⁶⁸ For example, assume SP properly perfected its interest PED by filing locally in State A. The Revised Article 9 perfection rules require a filing in State B or a central filing in State A. SP *cannot* continue the effectiveness of its PED financing statement by filing a continuation statement locally in State A. "A financing statement filed before the effective date of this Article may be continued *only by filing in the State and office designated by this Article.*"²⁶⁹

Revised Article 9 substantially changes the choice-of-law rules governing perfection. Consequently, in many cases, the creditor's PED filing will not conform with Revised Article 9's perfection rules. So, how does a creditor continue the effectiveness of its PED filing and thereby preserve its PED priority date? Revised section 9-706 describes the process.

Revised section 9-706 is captioned "When Initial Financing Statement Suffices to Continue Effectiveness of Financing Statement." Revised section 9-706(a) describes this special initial financing statement as "in lieu of a continuation statement." Freely paraphrased, a creditor can continue the effectiveness of its PED financing statement if it

- 1) files an initial financing statement that complies with Revised Article 9's rules regarding content (Part 5);
- 2) files it where Revised Article 9 would require a financing statement to be filed to perfect the creditor's security interest;
- 3) identifies (on that initial financing statement) the PED financing statement by filing office, date of filing and file number as well as the date and number of all continuation statements; *and*
- 4) states the PED filed financing statement remains effective.²⁷⁰

268. A PED filing also might not comply because Revised Article 9 redefines the collateral. E.g., assume the collateral is the debtor-licensor's right to receive payment under a license. The PED financing statement indicates the collateral as "general intangibles." Under Revised Article 9, the collateral is an account. The creditor has not satisfied Revised Article 9's perfection requirements. The financing statement fails to indicate the collateral covered.

269. R.U.C.C. § 9-705 cmt. 5.

270. *Id.* § 9-706(c).

These requirements are intended to permit searchers to find the necessary information about PED filings.

Although this initial financing statement filed "in lieu of a continuation statement" ("in lieu" financing statement) has the effect of continuing the effectiveness of the creditor's PED filed financing statement and maintaining the creditor's PED priority date, it is *not* a continuation statement. "It is governed by the rules applicable to initial financing statements."²⁷¹ So, for example, unlike a continuation statement which must be filed within the 6-month period prior to expiration of the filed financing statement, the "in lieu" initial financing statement can "be filed any time during the effectiveness of the pre-effective date financing statement—even before this Article is enacted"²⁷² So, too, "[i]n contrast to a continuation statement, which extends the lapse date of a filed financing statement for five years, the initial financing statement has its own lapse date, which bears no relation to the lapse date of the pre-effective date financing statement whose effectiveness the initial financing statement continues."²⁷³ So, the "in lieu" financing statement continues the effectiveness of the PED financing statement for 5 years *from the date the "in lieu" statement is filed*.²⁷⁴

The comments are careful to point out that "an initial financing statement filed before the effective date of this Article does not continue the effectiveness of a pre-effective-date financing statement unless the latter remains effective on the effective date of this Article."²⁷⁵ This makes sense. An "in lieu" initial financing statement has no legal effect until Revised Article 9 becomes effective. If the PED filed financing statement has expired by the time Revised Article 9 and the "in lieu" statement become effective, there is nothing the "in lieu" statement can preserve or continue.

The "in lieu" financing statement, like any other initial financing statement, must comply with Revised Article 9 (although the debtor need

271. *Id.* § 9-706, cmt. 1.

272. *Id.* § 9-706, cmt. 1.

273. *Id.* § 9-706 cmt. 1.

274. Bradley Smith, chair of the Transition Task Force, states that the filing of an "in lieu of" initial financing statement "continues the effectiveness of the pre-effective date financing statement for the period applicable to an initial financing statement, as specified in Old U.C.C. § 9-403 if the continuation filing is made prior to the effective date of Revised Article 9 and for the period specified in section 9-515 if the continuation filing is made after the effective date." Smith, *supra* note 245, at 1345.

275. R.U.C.C. § 9-706 cmt. 1.

not authorize the filing). Thus, it must indicate the type of collateral *as defined by Revised Article 9*. For example, assume the PED financing statement listed general intangibles and was intended to perfect the creditor's interest in the debtor's lottery winnings. The "in lieu of" initial financing statement needs to indicate "accounts."²⁷⁶ So, too, it must give the debtor's legal name, even if the PED filing gave the debtor's trade name and that was sufficient, PED, to perfect the creditor's interest.²⁷⁷

One "in lieu" statement can continue the effectiveness of multiple PED filings.²⁷⁸ It must simply identify all PED financing statements by indicating the office in which they were filed, the dates they were filed, their file numbers and their most recent continuation statement, if any.²⁷⁹ As noted, the "in lieu" statement must also indicate that the PED statements are to continue effective.²⁸⁰

The rules governing the "in lieu of" initial financing statement - when it can be filed, what it has to say, how it must make PED filings conform to Revised Article 9's requirements, when it has to be continued - are not easy. One little slip and the creditor will lose its perfected status at some point post-effective date. One of two dastardly things could happen thereafter. Either the creditor never realizes the problem, the debtor files bankruptcy and the trustee avoids the creditor's interest under § 544(a), or the creditor realizes the mistake, corrects it and less than 90 days later, the debtor files bankruptcy, and the creditor's interest is a preference.

By way of re-cap, let's distinguish the effect of filing a plain old "initial financing statement," (a financing statement that complies with all of Revised Article 9's requirements) from the effect of filing an "in lieu" initial financing statement. The creditor who files an initial financing statement that complies with Revised Article 9 perfects its interest according to Revised Article 9's rules. If a creditor files that

276. *Id.* § 9-706 cmt. 2.

277. Bradley Smith describes the "in lieu of" initial financing statement as follows: Section 9-705(f) states the rule that a financing statement comprising both an initial filing made prior to the effective date of Revised Article 9 and a continuation statement filed after such effective date "is effective only to the extent that it satisfies the requirements of Part 5 [of Revised Article 9] for an initial financing statement." In other words, to the extent that the pre-effective date filing does not itself satisfy those requirements, the continuation statement must remedy the deficiency.

Smith, *supra* note 215, at 1344.

278. R.U.C.C. § 9-706 cmt. 2.

279. *Id.* § 9-706(c)(2).

280. *Id.* § 9-706(c)(3).

initial financing statement PED (and does not comply with the perfection rules of former Article 9), the initial financing statement becomes effective on the date Revised Article 9 becomes effective.²⁸¹ If it is filed after Revised Article 9 becomes effective, it becomes effective when filed. It has no effect on the creditor's PED filed financing statement. It will not continue the effectiveness of a creditor's PED filed financing statement. It will not preserve a creditor's PED priority date. In contrast, an "in lieu" statement, assuming it is done properly, *will* continue the effectiveness of the creditor's PED financing statement and *will* preserve the creditor's PED priority date.

b. PED Creditors Holding Enforceable But Unperfected Security Interests Immediately before Revised Article 9 Takes Effect

Revised section 9-704 discusses PED security interests that are enforceable but unperfected immediately before Revised Article 9 takes effect. It states another one-year rule. These rules, mercifully, are straightforward.

First, the security interest remains enforceable for one year.²⁸²

Second, it remains enforceable beyond the one-year period if

- 1) it satisfied Revised Article 9's enforceability (attachment) requirements when Revised Article 9 took effect; or
- 2) the creditor takes action within one year after Revised Article 9's effective date to satisfy those requirements.²⁸³

Third, the unperfected PED interest becomes *perfected* under Revised Article 9 when it satisfies Revised Article 9's perfection requirements.²⁸⁴ If it satisfies Revised Article 9's perfection requirements as of Revised Article 9's effective date, it is perfected at that time. No further action is necessary. Otherwise, it becomes perfected when

281. "If an initial financing statement is filed under this section before the effective date of this Article, it takes effect when this Article takes effect (assuming it is ineffective under former Article 9)." R.U.C.C. § 9-706 cmt. 1.

282. R.U.C.C. § 9-704(1).

283. *Id.* § 9-704(2).

284. *Id.* § 9-704(3).

the creditor does what Revised Article 9 requires it to do to perfect the interest.²⁸⁵

When would a PED security interest, unperfected immediately before the effective date of Revised Article 9, become perfected on Revised Article 9's effective date without further action? The Official Comment discusses the PED filing of an "all assets" financing statement.²⁸⁶ According to a vast majority of courts interpreting former Article 9, a supergeneric description on a financing statement was invalid.²⁸⁷ Revised Article 9 validates such descriptions.²⁸⁸ Assuming the "all assets" financing statement was filed according to Revised Article 9's choice-of-law and filing rules, it would, without more, perfect the creditor's interest in whatever assets were adequately described in the debtor's security agreement as of Revised Article 9's effective date.

c. Security Interests that Attach Post-effective Date

Revised section 9-705(a) describes the treatment of security interests that only come into existence—attach—*after* Revised Article 9 becomes effective. If action *other than the filing of a financing statement* is taken PED, and that action would have given the actor priority over a lien creditor *had the security interest attached PED*, then, that action is effective to perfect a security interest that attaches within one year after Revised Article 9 becomes effective. The interest perfects, when it attaches. But the interest becomes unperfected if the creditor fails to re-perfect it according to Revised Article 9's perfection rules within one year after Revised Article 9 becomes effective. This tracks revised section 9-703(c)'s one-year rule but applies the rule to security interests that only attach post-effective date.

Although the comments do not give an example of this rule, one commentator notes:

The bailee with notice example cited in Example 2 in the Official Comments to section 9-703 could serve as well to illustrate the operation of section 9-705(a): to the extent the secured party is relying on a pre-effective date notice to a bailee for perfection as to then existing and thereafter acquired collateral (as might be the case

285. *Id.* § 9-704(2)(B).

286. *Id.* § 9-704 cmt., Example.

287. *See, e.g.,* Gill v. United States (*In re Boogie Enters.*), 866 F.2d 1172 (9th Cir. 1989).

288. R.U.C.C. § 9-504(2).

under certain mortgage warehousing arrangements), it benefits from the same one-year grace period as to both existing and future collateral within which period it must secure the bailee's authentication of a record acknowledging that it holds for the secured party.²⁸⁹

Revised section 9-705(a) governs a very narrow band of security interests. Its rule is limited to interests that attach post-effective date and for which perfection would be achieved through an act other than the filing of a financing statement.

3. *Post-effective Date Amendments to PED Financing Statements*

Section 9-707 describes how a creditor amends a PED filed financing statement. It provides that once Revised Article 9 becomes effective, its rules govern amendments with one very limited exception, termination of a PED financing statement for which no in lieu initial financing statement has been filed.²⁹⁰ So, the creditor who wants to add or delete collateral or continue the effectiveness of a financing statement filed PED must comply with Revised Article 9's amendment and continuation rules.

A creditor can amend a PED statement post-effective date one of three ways.

289. Smith, *supra* note 215, at 1341.

290. R.U.C.C. § 9-707(e) provides:

Whether or not the law of this State governs perfection of a security interest, the effectiveness of a pre-effective date financing statement filed in this State may be terminated after this [Act] takes effect by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies Section 9-706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 as the office in which to file a financing statement.

According to Sigman and Smith, this exception regarding termination statements is more limited than would appear at first glance. Not only is the exception not available when the creditor has filed an in lieu statement according to Revised Article 9's rules, but it is not

available if the Pre-Effective-Date Financing Statement is on file in an office that is not the filing office specified by the Post-Effective-Date domestic law of that jurisdiction as the office in which to perfect by filing. Indeed, the alternative location for filing a termination statement might well be available only in cases where the Pre-Effective-Date Financing Statement is on file in a statewide central office.

Harry C. Sigman & Edwin E. Smith, *Revised U.C.C. Article 9: Transition Rules: Insuring a Soft Landing - Part II*, 55 BUS. LAW. 1763, 1777 (2000). It may be easier to comply with Revised Article 9's rules regarding termination statements than to figure out when and if the exception applies.

1) If the PED financing statement is filed in the office required by Revised Article 9 to perfect the creditor's interest, the creditor can simply file its amendment in that office.

2) If the PED financing statement was not filed in the office Revised Article 9 would require, the creditor can file the amendment concurrently with or after the creditor has filed in that office an initial financing statement complying with revised section 9-706(c).

3) Finally, the creditor can amend by filing in that office an initial financing statement that provides the information as amended and that complies with revised section 9-706(c).

4. Persons Entitled to File Initial Financing Statement or Continuation Statement

The transition rules authorize a person to file an initial financing statement or a continuation statement under Part 7 if the secured party of record authorizes the filing and it is necessary to continue the effectiveness of a PED financing statement or to perfect or to continue to perfect a security interest.²⁹¹ The debtor is not required to authorize the filing because filings pursuant to Part 7 of Revised Article 9 normally act to continue the effectiveness of a financing statement already authorized by the debtor.²⁹²

Part 7 also states transition priority rules. According to revised U.C.C. section 9-709(a), generally, Revised Article 9's priority rules govern all priority disputes. They do not apply if the parties' relative priority was established before Revised Article 9 became effective.²⁹³ Be careful about what this exception is really saying. It is NOT saying enactment of Revised Article 9 freezes the parties' relative priority as of its effective date. It is simply establishing that enactment of Revised Article 9 does not, without more, affect their PED priority: "[T]he mere taking effect of this Article does not of itself adversely affect the priority of conflicting claims to collateral."²⁹⁴ Post-effective date action by one creditor can alter PED priorities. For example, assume both creditors

291. R.U.C.C. § 9-708.

292. *Id.* § 9-708 cmt.

293. *Id.* § 9-708.

294. *Id.* § 9-708 cmt. 1.

were unperfected under old Article 9 as of Revised Article 9's effective date. Creditor 1's interest, as the first to attach, would have priority.²⁹⁵ If, post-effective date, Creditor 2 were to file a financing statement to perfect its interest according to Revised Article 9's rules, it would have priority over Creditor 1 as the first to file or perfect.²⁹⁶ As the Official Comments explain, "by taking the affirmative step of filing a financing statement, SP-2 established anew the relative priority of the conflicting claims after the effective date. Thus, this Article determines priority. SP-2's security interest has priority under Section 9-322(a)(1)."²⁹⁷

When would relative priorities be established before Revised Article 9 takes effect? The obvious example is of two perfected PED creditors but even this is subject to change post-effective date. Assume Creditor 1 had priority under old Article 9. Post-effective date, it fails to properly continue its PED financing statement. Under Revised Article 9, when a creditor fails to timely continue the effectiveness of its filed financing statement, the security interest "is deemed never to have been perfected as against a purchaser of the collateral for value."²⁹⁸ A secured creditor is a purchaser. Creditor 2, if it gave value, would have priority over Creditor 1 (assuming Creditor 2's PED financing statement remained effective).

The comments give another, more complicated illustration. They pose SP1, PED, with a security interest in the debtor's (D) lottery winnings.²⁹⁹ SP1 files against D's accounts. (SP1 is unperfected because a debtor's right to lottery winnings were a general intangible under old Article 9.) Later but still PED, SP2 takes and properly perfects a security interest in D's lottery winnings by filing on D's general intangibles. Before Revised Article 9 takes effect, SP2 has priority over SP1. Once Revised Article 9 becomes effective, SP1's filing on accounts would perfect its interest, assuming it was filed in the right place. And it filed first. Although it would have priority if Revised Article 9 controlled, old Article 9 governs because the relative priority of the parties' claims were established before Revised Article 9 became effective. Therefore, SP2 retains its priority post-effective date. (It is also possible to rationalize this result by saying that SP1's earlier-filed financing statement did not become effective until Revised Article 9

295. U.C.C. § 9-312(5)(b).

296. R.U.C.C. § 9-708 cmt. 1, Example 3.

297. *Id.*

298. *Id.* § 9-515(c).

299. *Id.* § 9-709 cmt. 1, Example 4.

became effective and therefore, even though it had filed first, its filing was ineffective at the time it was made.)

Revised section 9-709(b) is captioned "Priority if security interest becomes enforceable under Section 9-203." This subsection is limited to security interests that attach post-effective date. It provides:

For purposes of Section 9-322(a), the priority of a security interest that becomes enforceable under Section 9-203 of this [Act] dates from the time this [Act] takes effect if the security interest is perfected under this [Act] by the filing of a financing statement before this [Act] takes effect which would not have been effective to perfect the security interest under [former Article 9].

Freely translated, if what the creditor did PED would satisfy Revised Article 9's perfection requirements but not former Article 9's requirements, the creditor's priority date for post-effective date security interests is Revised Article 9's effective date. So, if Revised Article 9 became effective in State X on July 1, 2001, and as of that date, the creditor had complied with Revised Article 9's steps for perfection, priority for its post-effective date security interests would date from July 1, 2001.

Of course, this subsection would not be complete without an exception and an exception there is. The rule "does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement."³⁰⁰ So, the priority date for security interests that attach post-effective date is not Revised Article 9's effective date if they all became perfected by a PED filing that complied with Revised Article 9 but not old Article 9. In that case, Revised Article 9's first-to-file-or-perfect rule governs. So, whoever, PED, was the first to do what Revised Article 9 required for perfection will have priority to security interests that attach post-effective date.

The comments give the example of two creditors who filed PED on instruments.³⁰¹ Old Article 9 required possession to perfect an interest in instruments.³⁰² Revised Article 9 permits filing.³⁰³ A rule establishing Revised Article 9's effective date as their priority date would not give

300. *Id.* § 9-709(b).

301. *Id.* § 9-709 cmt. 2, Example 7.

302. U.C.C. § 9-304(1).

303. R.U.C.C. § 9-312(a) ("A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.").

one creditor priority over the other. Resort to Revised Article 9's priority rules and revised section 9-322(a)'s first-to-file-or-perfect rule does. The first creditor who filed PED will have priority under Revised Article 9.

VIII. ENFORCEMENT PROVISIONS - DEFAULT

A. INTRODUCTION

Part 6 of Revised Article 9 is the counterpart to Article 9's Part 5. Part 5 of Article 9 consists of 7 provisions. Part 6 of Revised Article 9 weighs in at 28 provisions. One supposes that old Article 9's general exhortation to secured creditors to proceed in a commercially reasonable fashion was too mushy, too fluid, too fraught with peril. Part 6 of Revised Article 9 is very concrete. It states some very clear rules and supplies some very clear forms, all of which are very clearly intended to provide safe harbors for the creditor. For instance, in non-consumer transactions, a notice of default sent 10 or more days before the earliest time of disposition is per se reasonable.³⁰⁴ Revised U.C.C. section 9-613 provides sample notice forms for private and public sales. If creditors (or their attorneys) fill in the information the form elicits, they can enjoy uninterrupted sleep at night, knowing they have provided the necessary information.³⁰⁵

Revised Article 9 also identifies the parties who must receive notice of the disposition.³⁰⁶ Along with the debtor (owner of the collateral), the foreclosing creditor must notify all secondary obligors,³⁰⁷ all creditors on file (as defined) claiming an interest in the collateral and all creditors (as defined) with interests in the collateral perfected by compliance with another notice system.

Despite its length and clarity, Part 6 fails to state clear rules on certain key issues. For instance, it is deafeningly silent on when a sale is a private or public sale. It is all very nice to have safe harbor forms for each type of sale, but without guidance about when to use which

304. *Id.* § 9-612(b). "The 10-day notice period in subsection (b) is intended to be a 'safe harbor' and not a minimum requirement. To qualify for the 'safe harbor,' the notification must be sent after default." *Id.* § 9-612 cmt. 3.

305. *Id.* § 9-613(5).

306. *Id.* § 9-611(c).

307. *Id.* § 9-102(a)(71) defines "secondary obligor" to include sureties and others having a right of recourse.

form (and when the creditor can bid), the creditor is hardly "safe."³⁰⁸ In the consumer arena, Revised Article 9 refuses to state a safe harbor rule regarding what is a reasonable time for notice of a disposition.³⁰⁹ In the consumer context as well, it declines to state a rule governing the effect of creditor noncompliance with Part 6's rules.³¹⁰

Moreover, if creditors think Revised Article 9 liberates them from mushy post-default standards of conduct, they need to think again. First, Revised Article 9 posits the same open-ended, overarching requirement that every aspect of the disposition - method, manner, time, place and terms - be commercially reasonable.³¹¹ Second, Revised Article 9 defines "good faith" to include not only "honesty in fact," but "the observance of reasonable commercial standards of fair dealing."³¹² The Code imposes an obligation of good faith in the performance and enforcement of every contract and duty.³¹³ This means the creditor must observe reasonable commercial standards of fair dealing when it declares a default or seeks to collect or enforce an obligation.

B. MAJOR INNOVATIONS IN *COMMERCIAL DEBTOR* CONTEXT

In the interests of space and time, the following discussion is limited to the most important changes wrought by Part 6 in the *commercial debtor context*. The next section, Section IX, discusses Revised Article 9's treatment of consumers, including its special consumer rules in the post-default phase of a secured transaction.

1. Parties the Foreclosing Creditor Must Notify - Revised Section 9-611

Revised section 9-611 imposes a new, significant duty on the foreclosing creditor to notify other interested claimants of the disposition. Former Article 9 only required the creditor to give notice to those

308. And the creditor cannot finesse the situation by following Mark Twain's advice that "when you come to a fork in the road, you should take it." A sale is either a public sale or a private sale. It can't be both. Moreover, notice for a private sale does not comply with the requirements for notice of a public sale and vice versa.

309. R.U.C.C. § 9-612(b).

310. *Id.* § 9-626(b).

311. *Id.* § 9-610(b).

312. *Id.* § 9-102(a)(43).

313. U.C.C. § 1-203.

who gave notice to it of their claim.³¹⁴ Revised Article 9 imposes a duty on the foreclosing creditor to search for outstanding claims to the collateral, both in the U.C.C. files and under separate state and federal notice systems.

The provision begins by defining "notification date" because it uses that moment in time to limit the foreclosing creditor's search and notification duties. The notification date is the date at which the creditor sends an authenticated notification of disposition to the debtor and any secondary obligor, *or* the time when the debtor and any secondary obligor waive their right to notification.³¹⁵

According to revised section 9-611(b), the creditor must send an authenticated notification of disposition to:

- 1) the debtor;³¹⁶
- 2) any secondary obligor;³¹⁷
- 3) everyone who has notified the creditor of its interest before the notification date;³¹⁸
- 4) anyone on file, secured creditor or lienholder, who 10 days before the notification date, held a security interest in the collateral perfected by a filed financing statement that identifies the collateral, is indexed under the debtor's name as the creditor knows it, and *is filed in the office where a financing statement regarding that debtor would currently be filed*;³¹⁹
and
- 5) other secured creditors, who, 10-days before the notification date, held a security interest in the collateral perfected by compliance with a separate public notice system established by statute, regulation or treaty.³²⁰

The comments explain why the revisors chose to increase the foreclosing creditor's notification duties:

314. U.C.C. § 9-504(3) (in non-consumer cases, "notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral").

315. R.U.C.C. § 9-611(a)(1)-(2).

316. *Id.* § 9-611(c)(1).

317. *Id.* § 9-611(c)(2).

318. *Id.* § 9-611(c)(3)(A).

319. *Id.* § 9-611(c)(3)(B) (emphasis added). The foreclosing creditor fulfills its notification duty by notifying those who have given public notice (filed their financing statements) according to Revised Article 9's rules. The PED creditor should file its "in lieu" statement immediately to insure notice from (or rights against) the foreclosing creditor.

320. *Id.* § 9-611(c)(3)(C).

Many of the problems arising from dispositions of collateral encumbered by multiple security interests can be ameliorated or solved by informing all secured parties of an intended disposition and affording them the opportunity to work with one another. To this end, subsection (c)(3)(B) expands the duties of the foreclosing secured party to include the duty to notify (and the corresponding burden of searching the files to discover) certain competing secured parties. The subsection imposes a search burden that in some cases may be greater than the pre-1972 burden on foreclosing secured parties but certainly is more modest than that faced by a new secured lender.

To determine who is entitled to notification, the foreclosing secured party must determine the proper office for filing a financing statement as of a particular date, measured by reference to the "notification date," This determination requires reference to the choice-of-law provisions of Part 3. The secured party must ascertain whether any financing statements covering the collateral and indexed under the debtor's name, as the name existed as of that date, in fact were filed in that office. The foreclosing creditor generally need not notify secured parties whose effective financing statement may have become more difficult to locate because of changes in the location of the debtor, proceeds rules, or changes in the debtor's name.³²¹

Revised section 9-611(e) creates a safe harbor for the creditor in recognition of filing office delays. The creditor generally satisfies its search and notification duties "if it requests a search from the proper office at least 20 but no more than 30 days before sending notification to the debtor" and all those identified on the search report.³²²

For some debtors, Revised Article 9 may generate mountains of filings in a single filing location. This might make the creditor's search and notification duties overwhelming in some cases.

2. *Partial Strict Foreclosure - Revised section 9-620*

Along with a creditor's acceptance of collateral in *full* satisfaction of the debt owing (also known as "strict foreclosure"), revised section 9-620 recognizes the possibility of accepting collateral in *partial* satisfaction of the obligation owing but *only in non-consumer transac-*

321. R.U.C.C. § 9-611 cmt. 4.

322. *Id.*

tions. According to revised section 9-620(a), a creditor "may accept collateral in . . . partial satisfaction of the obligation it secures . . . if . . . (1) the debtor . . . agrees to the terms of the acceptance in a record authenticated after default . . .," and (2) no one entitled to receive notification of the creditor's proposal objects within the requisite time.³²³ Acceptance of collateral in partial satisfaction of the debt requires the debtor's express consent. "The prohibition against implied consent . . . presumably results from a heightened concern that through mere silence a debtor should not lose its property *and* also remain liable for an amount of debt calculated by the creditor in its sole discretion."³²⁴ Beyond requiring a debtor's express post-default consent, though, the rules regarding acceptance of collateral in partial satisfaction of the obligation basically mirror those for acceptance of collateral in full satisfaction of the debt.³²⁵

In addition to the debtor, the creditor must notify certain other interested parties of its proposal to accept the collateral. Revised section 9-621 lists the parties. Not surprisingly, it strongly resembles the classes of parties entitled to receive notice of the foreclosing creditor's intended disposition, e.g., secured creditors and lienholders who have notified the creditor, creditors on file with conflicting claims to the collateral, and other creditors who have given public notice of their interest in the collateral by complying with a separate statute, treaty or regulation.³²⁶ For acceptances in partial satisfaction of the debt, the creditor must also send its proposal to any secondary obligor.³²⁷ Any party can object. If an objection is timely made,³²⁸ the creditor must dispose of the collateral pursuant to revised section 9-610.

The comments explain that the enforcing creditor has no safe harbor that excuses it

323. *Id.* § 9-620(a), (b), (c)(1). R.U.C.C. § 9-620(b) eliminates constructive strict foreclosure by requiring the creditor either to send a proposal for strict foreclosure or to consent to the debtor's acceptance in an authenticated record. *Id.* § 9-620(b).

324. TIMOTHY R. ZINNECKER, *THE DEFAULT PROVISIONS OF REVISED ARTICLE 9*, at 125 (ABA 1999).

325. R.U.C.C. § 9-620 cmt. 3.

326. *Id.* § 9-621(a).

327. *Id.* § 9-621(b).

328. *Id.* § 9-620(d) describes when a notification of objection is effective. The time period is short. For instance, for those receiving notice of the creditor's proposal pursuant to R.U.C.C. § 9-621, the secured party must receive the notice of objection within 20 days after the secured party sent the proposal. R.U.C.C. § 9-620(d)(1). This is less than 20 days because the clock starts ticking when the creditor sends the proposal and the creditor must receive notice of the objection within 20 days of that date.

from notifying certain secured parties and other lienholders. This is because, unlike Section 9-610, which requires that disposition of collateral be commercially reasonable, Section 9-620 permits the debtor and secured party to set the amount of credit the debtor will receive for the collateral subject only to the requirement of good faith. An effective acceptance discharges subordinate security interests and other subordinate liens.³²⁹

In other words, the requirement of a *commercially reasonable sale* protects the interests of creditors who do not receive notice of the enforcing creditor's intended disposition. No comparable protection exists when the creditor accepts collateral in satisfaction of the debt, fully or partially. Consequently, those entitled to notice who do not receive it have the right to recover damages for any loss suffered as a result of their failure to receive notice.³³⁰

With partial strict foreclosure, the parties are fixing the debtor's deficiency liability by agreement. They are determining the value of the collateral and hence how much to deduct from the indebtedness owing. No disposition of the collateral occurs. Beyond the requirements of the debtor's express assent and notice to the various other parties affected by the process, are there any other checks on the creditor who proposes partial strict foreclosure? Yes. First, as noted above, it is not available in consumer transactions.³³¹ Second, the creditor has a duty of good faith which cannot be disclaimed:

Thus, a proposal and acceptance made under this section in bad faith would not be effective. For example, a secured party's proposal to accept marketable securities worth \$1,000 in full satisfaction of indebtedness in the amount of \$100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith. On the other hand, in the normal case proposals and acceptances should not be second-guessed on the basis of the "value" of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith.³³²

329. *Id.* § 9-621 cmt. 2.

330. *Id.* § 9-625(b).

331. *Id.* § 9-620(g).

332. *Id.* § 9-620 cmt. 11.

Appraisal of the collateral by an independent third party chosen by both the debtor and creditor would presumably help to insulate the agreement from subsequent attack. If done fairly, partial strict foreclosure will help the debtor. It eliminates the need for creditor disposition and thereby reduces the creditor's costs (and potential exposure). That, in turn, should reduce the debtor's deficiency liability.

Revised section 9-622 spells out the legal consequences of a creditor's "acceptance of collateral."

1. It discharges the obligation to the extent of the debtor's consent;
2. it transfers all the debtor's rights in the collateral to the creditor;
3. it discharges the security interest or agricultural lien subject to the debtor's consent and any subordinate security interest or lien; and
4. finally, it terminates any other subordinate interest.

The above consequences occur even if the creditor fails to comply with revised sections 9-620 and 9-621.³³³

3. Unreasonably Low Foreclosure Sale Proceeds: Revised Section 9-615(f)

Revised Article 9 states a special rule for dispositions to the secured creditor, a person related to³³⁴ the secured party, or a secondary obligor if the disposition realizes significantly less than what would have been realized by a complying disposition to someone other than the secured party, someone related to the secured party or a secondary obligor. According to revised section 9-615(f), "the surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor." According to the comments, this rule is designed to compensate for the creditor's lack of incentive to maximize proceeds when it is buying the collateral itself or selling it to a related party or secondary obligor who is liable to it in any event.

333. *Id.* § 9-622(b).

334. *Id.* § 9-102(a)(62)-(a)(63) defines "person related to."

The debtor has the burden to prove that the proceeds realized were significantly below the range of proceeds a complying sale to someone else would have generated.³³⁵ Exactly how the debtor can meet its burden of proof here, how courts will administer this rule and how debtors in default can afford such litigation are left unanswered. The comments suggest that the creditor's receipt of a low price does not necessarily indicate creditor noncompliance with Part 6. It "may suggest the need for greater judicial scrutiny."³³⁶

4. Rebuttable Presumption Approach for Non-Complying Non-Consumer Dispositions: Revised section 9-626

Revised section 9-626 states a series of rules governing actions to collect a deficiency or surplus in *non-consumer transactions*. It is a linguistic labyrinth that codifies the rebuttable presumption rule for non-consumer transactions. Stripped to its essentials, revised section 9-626 provides that

- ◆ The secured creditor is not required to prove compliance with Part 6 unless the debtor or a secondary obligor raises the issue.³³⁷
- ◆ If placed in issue, the creditor has the burden to prove its compliance.³³⁸
- ◆ If the creditor does not meet this burden, the debtor or secondary obligor's liability is limited to an amount by which the sum of the secured obligation, expenses and attorney's fees exceeds the greater of
 - the proceeds of the creditor's collection, enforcement, disposition of acceptance; or
 - the amount of proceeds the creditor would have realized had it complied.³³⁹
- ◆ The amount of proceeds the creditor would have received had it complied is equal to the sum of the creditor's debt,

335. R.U.C.C. § 9-626(a)(5).

336. *Id.* § 9-615 cmt. 6.

337. *Id.* § 9-626(a)(1).

338. *Id.* § 9-626(a)(2).

339. *Id.* § 9-626(a)(3).

expenses and attorney's fees unless the creditor proves the amount is less than that.³⁴⁰

The comments caution that revised section 9-626 only applies to a creditor's failure to comply with Part 6's rules regarding collection, enforcement, disposition or acceptance.³⁴¹ So, revised section 9-626's rule does not address or sanction a wrongful repossession. Instead, revised section 9-625(b)'s provisions requiring compensation for actual loss suffered govern.

*5. Warranties on Disposition & Disclaimer of Warranty Rules:
Revised Section 9-610(d)-(f)*

Unless disclaimed, the secured creditor gives the same warranties that would accompany a comparable voluntary disposition of the collateral.³⁴² So, the creditor who disposes of collateral by sale gives whatever warranties, by operation of law, accompany a voluntary sale. The creditor who disposes of collateral by leasing it gives whatever warranties accompany a lease of goods. The creditor who disposes of collateral by license gives the warranties a licensor gives at law. The statute mentions warranties regarding title, possession, quiet enjoyment and the like. Does "and the like" include the § 2-314 implied warranty of merchantability? That is, does the foreclosing creditor make any implied representations regarding the quality of the goods sold? Only merchants who deal in goods of the kind give the § 2-314 implied warranty of merchantability. The bank who conducts a foreclosure sale does not deal in goods of the kind and therefore does not give the implied warranty of merchantability. A seller-creditor, e.g., a car dealer, would give the warranty if it sold a repossessed car.³⁴³ This would be big news for those who acquire property through a forced disposition but for the fact that the foreclosing merchant-creditor can disclaim or modify these warranties and one assumes any well-represented creditor will do so. Once again, those unacquainted with Revised Article 9 may experience a baptism by fire.

340. *Id.* § 9-626(a)(4).

341. R.U.C.C. § 9-626 cmt. 2.

342. *Id.* § 9-610(d).

343. The language "and the like" establishes that law other than Revised Article 9 gives rise to other statutory or implied warranties. R.U.C.C. § 9-610 cmt. 11. That other law also controls the effectiveness of attempted disclaimers. *Id.*

Revised section 9-610(e) describes how the creditor can validly disclaim or modify the warranties recognized in subsection (d). The creditor can disclaim or modify the warranties given on disposition in any manner recognized as effective for a comparable voluntary disposition.³⁴⁴ So, returning to the example of a car dealer, the car dealer as foreclosing creditor could disclaim the implied warranty by following the relevant disclaimer rules stated in § 2-316. A foreclosing creditor can also disclaim by "communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer"³⁴⁵ Finally, a record stating the seller-creditor does not give any warranty regarding title or quiet enjoyment, etc., is sufficient.³⁴⁶ This resembles Article 2's rule that statements like "as is," "with all faults" or similar language that in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that the seller gives no implied warranty are sufficient to disclaim the implied warranties.³⁴⁷

C. WAIVER

Freedom of contract is a fundamental principle undergirding the U.C.C. With some exceptions, parties may vary its provisions by agreement.³⁴⁸ But "in the context of rights and duties after default, our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties The context of default offers great opportunity for overreaching."³⁴⁹ Former Article 9 barred debtor waiver of certain creditor duties or certain debtor rights in the default context.³⁵⁰ Revised Article 9 significantly expands the list of unwaivable debtor rights and creditor duties.³⁵¹ The expansion occurs in several ways. First, Revised Article 9 makes non-waivable certain rights and duties that were at least theoretically waivable under

344. *Id.* § 9-610(e)(1).

345. *Id.* § 9-610(e)(2).

346. *Id.* § 9-610(f).

347. U.C.C. § 2-316(3)(a).

348. U.C.C. § 1-102.

349. R.U.C.C. § 9-602 cmt. 2.

350. U.C.C. § 9-501(3). These include U.C.C. §§ 9-502(2) and 9-504(2) (creditor's duty to account for surplus proceeds of collateral); U.C.C. §§ 9-504(3) and 9-505(1) (creditor's duties regarding disposition of collateral); U.C.C. § 9-506 (debtor's right to redeem collateral); and U.C.C. § 9-507 (creditor's liability for failure to comply with Part 5 of Article 9).

351. R.U.C.C. § 9-602 & cmt. 3.

former Article 9.³⁵² Second, it imposes additional non-waivable duties on the secured creditor and gives debtors additional non-waivable rights.³⁵³ Finally, it clarifies who enjoys these nonwaivable rights.

Former section 9-501(3) gave the anti-waiver protection to the "debtor." Under Revised Article 9, the restrictions on waiver apply both to "debtors" and "obligors,"³⁵⁴ thereby "resolv[ing] a question under former Article 9 as to whether secondary obligors, assuming that they were 'debtors' for purposes of former Part 5, were permitted to waive, . . . rights and duties under that part."³⁵⁵

IX. SPECIAL CONSUMER RULES

A. INTRODUCTION

Creating consensus on consumer rules for uniform laws has proved elusive. Revised Article 9 is no exception.

An important fact in regard to consumer provisions is that the Conference has not been particularly successful in securing adoptions of the Uniform Consumer Credit Code which contains many consumer protective provisions similar to those being proposed by consumer groups for Article 9. The experience with the Consumer Credit Code teaches us that it is very difficult to reach a national consensus on consumer issues which is acceptable in the various states. The differences in social, economic, and political conditions in the states are sufficiently great that rules that in one state are seen as insufficiently protective of consumer interests are seen in another as unjustified interference with market forces. Therefore, the drafting participants must recognize that the question of coverage of consumer issues in Article 9 involves not only a judgment as to the best substantive rule, but also a judgment regarding whether there is sufficient consensus on the appropriate substantive rule outside the Conference and the American Law Institute (ALI) that a decision made by the Conference and the ALI would be acceptable. Therefore, provisions which the sponsoring

352. Under former Article 9 (U.C.C. § 9-503) and Revised Article 9 (R.U.C.C. § 9-609(b)(2)), a creditor can only exercise its self-help remedy if it can do so without breaching the peace. Revised Article 9 makes that duty non-waivable. R.U.C.C. § 9-602(6).

353. For the full list of new rights and duties, see R.U.C.C. § 9-602 cmt. 3.

354. R.U.C.C. § 9-602.

355. *Id.* cmt. 4.

organizations believe substantively desirable might nevertheless not be included in Article 9 because of enactability concerns.³⁵⁶

And so, rather than state a substantively desirable but unenactable consumer protection rule, Revised Article 9 frequently states a rule for non-consumer goods transactions and defers to the courts of each state to develop a companion consumer rule in grand (unpredictable) common law style.³⁵⁷ For instance, revised section 9-626(a) essentially codifies the rebuttable presumption approach for non-complying dispositions "in actions[s] arising from a transaction *other than a consumer transaction*" Revised Article 9 neither approves nor disapproves the "rebuttable presumption" rule for consumer transactions. "The limitations of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches."³⁵⁸ In a similar spirit, Revised Article 9 abolishes the transformation rule for non-consumer goods transactions,³⁵⁹ and delegates to the courts the task of determining the proper approach for consumer-goods transactions.³⁶⁰

B. DEFINITIONS

Revised Article 9 defines "consumer debtor," "consumer goods," "consumer-goods transaction," "consumer obligor" and "consumer transaction." "Debtor" means the person having an interest in the collateral, other than a security interest, e.g., "debtor" includes the owner of the collateral.³⁶¹ A *consumer debtor* is the "debtor" in a consumer transaction. A "consumer obligor" is an individual (human being) who

356. Report of the Consumer Issues Subcommittee of the U.C.C. Article 9 Drafting Committee (issued May 29, 1996), reprinted in 50 CONSUMER FIN. L.Q. REP. 332, 332 (1996), quoted in Marion W. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHIC.-KENT L. REV. 1255, 1256 (1999). See also Diann M. Bartek & H. Joseph Acosta, *The Effect of Revised Article 9 on Consumer Transactions*, 9 J. BANKR. L. & PRAC. 571, 587 (2000); Donald J. Rapson, *Default & Enforcement of Security Interests under Revised Article 9* (Symposium on Revised UCC Article 9), 74 CHIC.-KENT L. REV. 893, 897 n.23 (1999).

357. One commentator describes these as "we punt" provisions. Jean Braucher, *Deadlock: Consumer Transactions under Revised Article 9*, 73 AM. BANKR. L.J. 83, 95 (1999).

358. R.U.C.C. § 9-626(b).

359. *Id.* § 9-103(f).

360. *Id.* § 9-103(h).

361. *Id.* § 9-102(a)(28)(A).

incurs the obligation primarily for family, household, or personal reasons. A "consumer transaction" exists if

- ◆ an individual incurs *an obligation* primarily for personal, family, or household purposes;
- ◆ the security interest secures that obligation; and
- ◆ the obligor acquires *the collateral* primarily for personal, family or household purposes.³⁶²

A consumer-*goods* transaction is a consumer transaction in which the individual incurs the obligation principally for personal, family or household reasons and the obligation is secured by a security interest in *consumer goods*.³⁶³ Finally, in a transaction *involving* consumer goods, even though the obligation is secured by a security interest in *consumer goods*, the individual does *not* incur *the obligation* principally for personal, family or household reasons.³⁶⁴

Why all this complexity? Because Revised Article 9 states different rules depending on whether the transaction is a consumer transaction,³⁶⁵ a consumer-goods transaction³⁶⁶ or a transaction involving consumer goods.³⁶⁷ Consumer-goods transactions involve *goods* used for personal, family or household purposes that secure an obligation incurred for personal, family or household reasons. The collateral involved in a "consumer transaction" is not limited to consumer *goods*. It includes *any* collateral used primarily for personal, family or household purposes, e.g., a debtor's interest in a mutual fund account held by a brokerage firm, to secure an obligation incurred for family, personal or household purposes. In a transaction involving consumer goods, an

362. *Id.* § 9-102(a)(26).

363. *Id.* § 9-102(a)(24).

364. Benfield, *supra* note 327, at 1260. In developing this tripartite division, Professor Benfield cited to R.U.C.C. § 9-102(a)(27). *Id.* at n.14. Whatever that subsection may have discussed originally, it now defines "continuation statement." Even though Revised Article 9 does not specifically define "transaction involving consumer goods," an individual can secure a business obligation by granting a security interest in her consumer assets. The rules regarding consumer-goods transactions would not apply.

365. *E.g.*, R.U.C.C. § 9-108(e) (description requirement for security agreement in consumer transaction involving consumer goods, a security entitlement, a securities account, or a commodity account); R.U.C.C. § 9-109(d)(13) (deposits accounts excluded as original collateral in consumer transaction); R.U.C.C. § 9-620(g) (no "partial strict foreclosure" in consumer transactions).

366. *Id.* § 9-103(g) (no position on whether transformation rule applies to consumer-goods transactions); *Id.* § 9-614 (form and content of notice of disposition in consumer-goods transactions).

367. *Id.* § 9-625(c) (statutory damages for creditor's failure to comply with post-default rules).

individual grants a security interest in his or her consumer asset(s) to secure a business debt/obligation.

In a word, $E = MC^2$, and under Revised Article 9,

- consumer transaction = consumer obligation secured by consumer collateral;
- consumer-goods transaction = consumer obligation secured by consumer goods;
- and
- transaction involving consumer goods = non-consumer obligation secured by consumer goods

C. POST-DEFAULT CONSUMER RULES

1. *Introduction*

By way of handy reference, the Official Comments to revised section 9-101 summarize Revised Article 9's most significant innovations. Official Comment 4.j. is entitled "Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions." It lists many if not all of Revised Article 9's consumer rules (or their absence on a given issue). Not surprisingly, most of the consumer-based discussion occurs in Part 6 which addresses the post-default situation. For instance, the comment notes that revised section 9-612's 10-day safe harbor rule for notices of disposition does *not* apply to consumer transactions.³⁶⁸ Revised section 9-613's rules regarding the content and form of notice of disposition do *not* apply to a consumer-goods transaction.³⁶⁹ Instead, revised section 9-614 states special content and notice requirements for consumer-goods transactions and provides a safe-harbor, "plain English" form.³⁷⁰

The creditor who seeks to collect a deficiency in a consumer-goods transaction must provide the debtor with a detailed explanation of how it calculated the deficiency.³⁷¹ Revised Article 9 bans partial strict foreclosure in consumer-goods transactions presumably to protect consumer obligors from expressly agreeing to low ball collateral values

368. *Id.* § 9-101 cmt. j.v.

369. *Id.* § 9-101 cmt. j.vi.

370. *Id.* § 9-101, cmt. j.vii.

371. R.U.C.C. § 9-616.

and impliedly assuming high ball deficiency liability.³⁷² It also requires the creditor to dispose of consumer-goods collateral in certain cases unless the debtor, in an authenticated post-default record, has waived the requirement of creditor disposition.³⁷³

2. Notice of Disposition in Consumer-Goods Transactions: Revised Section 9-614

Revised section 9-614 states special, additional rules for notices of disposition involving consumer-goods transactions. (The relatively more relaxed revised section 9-613 requirements apply to consumer transactions not involving consumer-goods.) In addition to the requirements stated in revised section 9-613(1),³⁷⁴ a consumer-goods transaction notice must include "a description of any liability for a deficiency of the person to which the notification is sent, a telephone number" to call to obtain the amount needed to redeem the collateral, and a phone number or mailing address from which to obtain additional information concerning the disposition and the obligation secured.³⁷⁵

As with non-consumer-goods transactions, Revised Article 9 contains a "safe harbor" notice form for consumer-goods transactions.³⁷⁶ The form notice is sufficient even if additional information appears at the end of the form.³⁷⁷ If the form notice contains errors in information the form does *not* require, the notice is sufficient unless the error is misleading with respect to the debtor's rights.³⁷⁸

372. *Id.* § 9-620(g).

373. *Id.* § 9-620(e). R.U.C.C. § 9-620(e) basically tracks old U.C.C. § 9-505(1)'s requirement of mandatory disposition by the creditor if the debtor has paid 60% of the cash price in a pmsi transaction involving consumer goods, or 60% of the principal amount of the obligation secured by a non-pmsi in consumer goods.

374. According to R.U.C.C. § 9-613(1), a valid notice must describe the debtor, the secured party, and the collateral subject to intended disposition. In addition, it must also state

1) the intended method of disposition;

2) the debtor's right to an accounting of the unpaid indebtedness and the charge, if any, for such an accounting; and

3) the time and place of a public sale or the time after which any other disposition is to be made.

All notices must comply with R.U.C.C. § 9-613(1). The notice of disposition for consumer-goods transactions must include the additional information detailed by R.U.C.C. § 9-614.

375. R.U.C.C. § 9-614(1).

376. *Id.* § 9-614(3).

377. *Id.* § 9-614(4).

378. *Id.* § 9-614(5).

Unlike revised section 9-613(3)(B), revised section 9-614 does not specifically state that the notice is sufficient even though it contains "minor errors that are not seriously misleading."

The failure to include a minor-errors protection for the consumer-goods notice suggests that any error, no matter how slight, will make the notice inadequate and subject the creditor to substantial statutory damages recoverable for failure to comply with the Article 9 foreclosure rules even in the absence of harm. Whether such a result is justifiable is questionable. Errors might occur as to any of the required information: the collateral may be misdescribed (for example, 1999 automobile described as 1998); debtor's or creditor's address may be misstated; the time of a public sale may be misstated; or the telephone number of the creditor may be misstated. If the model year of a repossessed automobile is misstated in the notice of sale, it is very unlikely that any harm will be caused by that alone. The debtor will almost certainly know that there has been a mistake

No doubt the absence from section 9-614 of the minor-errors-not-seriously-misleading defense suggests that courts should read the statutory requirements for the consumer-goods notice more strictly than they read the statutory requirements for the non-consumer-goods notice. Also, there is no statement here, as there is in the sections dealing with the absolute bar rule or the purchase money rules that by silence, Article 9 intends neutrality on the issue of whether a minor-errors-not-seriously-misleading defense is available for errors in the consumer-goods notice. However, neither of those considerations need lead courts to the conclusion that every error, no matter how trivial, leads to liability. Surely there must be some *de minimis* standard below which there is no violation even though a technical error has occurred.³⁷⁹

A creditor's failure to comply with revised section 9-614 can result in significant creditor liability pursuant to revised section 9-625(c)(2) which imposes damages in "an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price." As Professor McDonnell points out, "[t]his sum can be very substantial in transactions involving cars, boats and mobile homes."³⁸⁰

379. Benfield, *supra* note 327, at 1270-71.

380. McDONNELL, *supra* note 92, at § 9-614, 444.

3. *Time of Notice*

Whether the creditor sends the notice of disposition within a reasonable time is a question of fact.³⁸¹ In non-consumer transactions, Revised Article 9 adopts a safe harbor rule of 10 days: "In a transaction *other than a consumer transaction*, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition."³⁸² The comment characterizes the 10-day rule as a safe harbor and not as a minimum requirement.³⁸³ The comment further instructs that the creditor must send the notice in a commercially reasonable manner, explaining that such a requirement prevents the creditor from "taking advantage of the safe harbor . . ."³⁸⁴ So a creditor cannot send notice by carrier pigeon via the Panama Canal. Beyond saying it is a question of fact, revised section 9-612 and its comments are silent on what constitutes a reasonable time for notice in a consumer transaction.

According to Professor Benfield,

[t]he failure of the statute to give approval to a ten-day notice in consumer transactions might lead courts to find that a contracted for ten-day period is manifestly unreasonable and not effective to fix the time of notice: at least the failure to give statutory approval to a ten-day notice invites such an argument on behalf of a consumer debtor. Also, it should be noted that there is no provision here, as there is elsewhere in the statute, that courts should not draw any inferences as to the proper rule in consumer transactions from the limitation of the ten-day safe-harbor provision to commercial transactions. Therefore, it may be risky for a creditor to contract for, or to give, only a ten-day notice of sale in consumer transactions.³⁸⁵

381. R.U.C.C. § 9-612(a).

382. *Id.* § 9-612(b).

383. *Id.* § 9-612 cmt. 3.

384. *Id.*

385. Benfield, *supra* note 327, at 1273-74.

4. *Special Notice of Deficiency or Right to Surplus*

In consumer-goods transactions, if the debtor is entitled to a surplus or the consumer obligor is liable for a deficiency, the creditor *may* have to send a special notice to the debtor or obligor.³⁸⁶ If required, this special notice must provide a detailed explanation of how the creditor calculated the surplus or deficiency.³⁸⁷

a. When Required

As a threshold matter, this special notice rule only applies if the debtor is entitled to a surplus or the obligor is liable for a deficiency.³⁸⁸ So, the creditor has no duty whatsoever to account to the debtor or obligor if there is no deficiency or surplus. Moreover, if the creditor waives its right to a deficiency (in a record), it has no duty to account to the consumer obligor.³⁸⁹

b. When Section 9-616 Notice Must be Sent

Assuming the debtor is entitled to a surplus, the creditor must send the explanation of calculation of the surplus to the debtor

- 1) after the disposition, and
- 2) before or when it pays the debtor any surplus.³⁹⁰

Assuming the obligor is liable for a deficiency *and* the creditor has not waived its right to pursue the obligor for that deficiency, the creditor must send the obligor an explanation of calculation of the deficiency either

- after the disposition, and
 - before or when the creditor first makes written demand on the obligor to pay the deficiency;³⁹¹
- or*

386. R.U.C.C. § 9-616(b)(1).

387. *Id.* § 9-616(c).

388. *Id.* § 9-616(b).

389. *Id.* § 9-616(b)(2).

390. *Id.* § 9-616(b)(1).

391. *Id.* § 9-616(b)(1).

- within 14 days after receiving a request to do so.³⁹²

c. Content of Explanation of Calculation of Surplus or Deficiency

Revised section 9-616(c) details the required information for the explanation and further states that the information must be provided in the order listed. The creditor must include:

1. the aggregate amount of obligations secured by the security interest and "if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date . . .",³⁹³
2. the amount of proceeds realized from the disposition,³⁹⁴
3. the total amount of obligations owing after deducting the disposition proceeds;³⁹⁵
4. a listing of all expenses, in the aggregate and by type, including the costs of repossession, "holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees . . .",³⁹⁶
5. "the amount, in the aggregate or by type, and types of credit, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not [otherwise] reflected . . ."³⁹⁷ and
6. "the amount of the surplus or deficiency."³⁹⁸

d. Sanctions for Failure to Comply with Section 9-616 Explanation

Although revised section 9-616 mandates this notice if the creditor seeks to collect a deficiency (or the debtor is entitled to a surplus), the creditor's failure to provide it does not trigger revised section 9-625(c)(2)'s statutory penalty for creditor violations in consumer-goods

392. R.U.C.C. § 9-616(b)(2).

393. *Id.* § 9-616(c)(1).

394. *Id.* § 9-616(c)(2).

395. *Id.* § 9-616(c)(3).

396. *Id.* § 9-616(c)(4).

397. *Id.* § 9-616(c)(5).

398. *Id.* § 9-616(c)(6).

transactions.³⁹⁹ The creditor who fails to send the required explanation pursuant to revised section 9-616(b)(1) is liable for actual damages caused (whatever those might be) plus \$500 *only if* the creditor's failure to comply is "part of a pattern or consistent with a practice, of noncompliance."⁴⁰⁰ The creditor is liable for \$500 plus actual damages suffered if it fails to send the obligor liable for a deficiency a record waiving its deficiency claim within 14 days of receiving a request.⁴⁰¹

Note that revised section 9-616 does not apply if the creditor chooses not to pursue the obligor for a deficiency. Waiving its deficiency claim may protect the creditor more than the consumer debtor. An explanation, if provided, might help the consumer (or consumer's attorney) uncover flaws in the process which, if exposed, might entitle the consumer obligor to statutory damages. Waiving the deficiency claim might be cheaper to the creditor in the long run.

e. Evaluation of Section 9-616

Revised section 9-616's requirement of a notice/explanation of any deficiency/surplus represents Revised Article 9's most significant consumer innovation. Whether it will ultimately provide much in the way of protection to consumers remains to be seen. Professor Benfield writes:

At present there is no requirement that the creditor, when demanding that the debtor pay the deficiency, give any accounting showing how the deficiency was calculated. Consumer representatives in the drafting process argued that creditors sometimes fail to properly rebate unearned finance charges or refunds of insurance premiums when making a claim for deficiency. They believed that requiring

399. R.U.C.C. § 9-625(c)(2) posits statutory damages for consumer-goods transactions in "an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price."

400. *Id.* § 9-625(e)(5).

401. *Id.* § 9-625(e)(6). The statutory language is confusing. It provides:

[T]he secured party shall: . . . (2) in the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

Id. § 9-616(b)(2). One assumes the word "request" refers to the obligor's request for an explanation of his or her deficiency liability although it could refer to the obligor's request to the creditor to confirm that it will not hold the obligor liable for any deficiency.

Would a consumer debtor ever bother to retain an attorney to enforce his or her rights under R.U.C.C. § 9-616(b)(2)? Why kick a gift horse in the mouth? Exoneration from deficiency liability is a good thing, right? So, why pursue the creditor for failure to notify the obligor of the good news?

an accounting to the debtor after foreclosure would make creditors more careful about giving rebates and refunds. Also they argued that a notice showing the price received at a sale could alert consumers to possible problems with the sale itself. Creditors, on the other hand, believed that consumers would not gain enough from an automatic post-sale disclosure to justify the additional expense to creditors (and thus to borrowers) or to justify an additional statutory requirement for which there would be statutory penalties for failure to comply

The drafters decided to include a post-sale notice requirement for consumer-goods transactions but, in a concession to creditor concerns, provided only minimum penalties for creditor failures regarding the notice

Consumer representatives asserted that there is some practice, particularly in automobile finance, of the creditor always bidding in at the amount of the debt and expenses and then reselling the car. In that case, a notice might alert a debtor that the collateral had been bought by the creditor at . . . such a low price that it suggests that the sale was not commercially reasonable. However, the statute does not require an accounting if there is neither a deficiency nor a surplus; there is not even a right to request an accounting. Also, there is no obligation to give the notice if the creditor waives the right to a deficiency in a record.⁴⁰²

D. MISCELLANEOUS RULES INVOLVING OR SPECIALLY AFFECTING CONSUMERS

1. As noted earlier, Article 9 does not regulate consumer-consignor consignments.⁴⁰³

2. The corresponding amendments to Article 1 redefine "buyer in ordinary course." The class of buyers in ordinary course is limited to buyers who take possession of the goods or have "a right to recover the goods from the seller under Article 2"⁴⁰⁴ A proposed revision to Article 2 gives consumer buyers a special right to recover goods from a seller. Proposed revised section 2-502 provides:

402. Benfield, *supra* note 327, at 1274-75.

403. R.U.C.C. § 9-102(a)(20)(c).

404. Proposed Amendment to § 1-201(9).

Buyer's Right to Goods on Seller's Repudiation, Failure to Deliver or Insolvency

(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

The proposed revisions to Articles 1 and 2 have yet to be promulgated. If adopted, it would appear that consumer buyers will have a statutory right to specific performance upon identification of the goods to the contract. It would also appear that if the goods are not identified to the contract,⁴⁰⁵ consumer buyers will have a breach of contract action against their sellers who are probably in or on the way to bankruptcy.

Assume prospective car buyer (Buyer) goes to local car dealer (Dealer). Unbeknownst to Dealer's secured lender (Bank) and Buyer, Dealer is selling cars out of trust. Buyer orders a midnight blue 2001 Cabrio with all the options. Buyer makes a sizeable down payment. Dealer does not have a midnight blue 2001 cabrio in stock. Buyer may be in for a rude (and costly) surprise when Bank learns about Dealer fraud and shuts Dealer down. If the car is not in Dealer's stock, Dealer cannot ship, mark or otherwise designate the car as Buyer's. If Dealer defaults before identification of the cabrio, Buyer is limited to a breach

405. "Identification" is a term of art defined in § 2-501. Goods must be existing to be identified. So long as the goods are in existence, identification occurs when the parties' contract says it occurs. If the parties' agreement is silent, identification occurs when the seller ships, marks or otherwise designates the goods as belonging to the buyer's contract.

of contract claim against Dealer. That's it and it's not much if Dealer files bankruptcy.⁴⁰⁶

3. Revised Article 9 requires security agreement descriptions to be more specific in consumer transactions involving "consumer goods, a security entitlement, a securities account, or a commodity account."⁴⁰⁷ This is to "prevent debtors from inadvertently encumbering certain property . . ."⁴⁰⁸ The security agreement cannot describe such property by Article 9 type alone. A description will be sufficient regarding consumer goods, a security entitlement, a securities account, or a commodity account if the description reasonably identifies what is described and "contains a descriptive component beyond the 'type' alone."⁴⁰⁹

X. BANKRUPTCY IMPLICATIONS

Short-term, Revised Article 9's new choice-of-law and filing rules in conjunction with its transition rules will produce major confusion. They are sure to provide a steady supply of unperfected interests for bankruptcy trustees to avoid under the strong-arm clause. Lapses or interruptions in perfection with new perfection dates will create preference exposure.

What are Revised Article 9's long-term implications for bankruptcy, in particular, its effects on unsecured creditors and a Chapter 11 debtor's ability to reorganize? For sure, Revised Article 9 makes life significantly easier for the secured creditor. And that makes bankruptcy less threatening. For corporate debtors, the creditor need only file once, centrally, in the state of the debtor's incorporation, and be done with it. It can file to perfect its interest in instruments. It can file an "all assets" financing statement. It can take an Article 9 security interest in the commercial debtor's deposit accounts and tort claims. The definition of

406. 11 U.S.C. § 507(a)(6) (1998 & 2001 Supp.) gives a sixth priority to unsecured claims of individuals "arising from the deposit . . . of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided." This priority claim is capped at \$ 2,100 as of April 1, 2001. Although it sounds good in the abstract, it presupposes that the bankruptcy estate has sufficient unencumbered assets to pay priority claims down to the sixth rung. That may be a big and unwarranted assumption under Revised Article 9.

407. R.U.C.C. § 9-108(e)(2).

408. *Id.* § 9-108 cmt. 5.

409. *Id.*

"proceeds" seems to encompass any property remotely related, connected, derivative of or associated with the collateral:

"Proceeds" means . . . (A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; (B) whatever is collected on, or distributed on account of, collateral; (C) rights arising out of collateral; (D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or (E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.⁴¹⁰

Of course, courts in bankruptcy are not bound by this expansive definition although they might choose to follow it to maintain equilibrium between rights in and outside of bankruptcy. Revised Article 9 does away with § 9-306(4)'s threat to the Article 9 creditor's claim to its debtor's commingled accounts in an insolvency proceeding.⁴¹¹

In a word, Revised Article 9 dramatically expands the range of property available as Article 9 collateral. It vastly simplifies the process of taking, perfecting and maintaining a perfected interest in it. Will all these changes make a difference? Presumably, they will make it much harder for the trustee to find unperfected security interests to avoid under section 544(a).

Will the changes permit the Article 9 creditor to take and have it all? The question assumes a creditor cannot take and have it all now to the detriment of unsecured creditors. And that assumption is open to question. Although Revised Article 9 permits an Article 9 secured transaction regarding deposit accounts as original collateral, creditors presently can and do take security interests in deposit accounts. They just do so under other law and with significant uncertainty and risk. Moreover, more often than not, the creditor has an Article 9 security interest in the debtor's deposit accounts because it represents proceeds of its collateral. The same holds true for commercial tort claims and any other property a creditor wants as collateral.

410. *Id.* § 9-102(a)(64).

411. Former Article 9 limited a creditor's secured claim to commingled funds to no more than the cash proceeds the debtor received during the 10-days preceding its insolvency case. U.C.C. § 9-306(4)(d)(ii).

Arguably, it is not the expansion in Article 9's coverage but the simplification of the process that will have the biggest impact in bankruptcy. If taking and perfecting a security interest in everything is almost fool proof, any fool will be able to bankruptcy-proof its right to be paid. And that will mean little to nothing for the unsecureds unless the secured creditor chooses to share its bounty. In addition, it will give secured creditors an absolute veto power over their debtors' attempts to reorganize.

Attorneys for debtors and unsecured creditors anxiously await the reaction of bankruptcy judges to Revised Article 9. The ball, it would appear, is back in their court.